

EVIDENTIARY HEARING
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:)	
)	
Application for Certification)	Docket No.
of the Walnut Energy Center)	02-AFC-4
by Turlock Irrigation District)	
_____)	

CALIFORNIA ENERGY COMMISSION
HEARING ROOM A
1516 NINTH STREET
SACRAMENTO, CALIFORNIA

MONDAY, SEPTEMBER 29, 2003

10:10 a.m.

Reported by:
Peter Petty
Contract No. 170-01-001

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

COMMITTEE MEMBERS PRESENT

James Boyd, Presiding Member

HEARING OFFICER, ADVISORS PRESENT

Stanley Valkosky, Hearing Officer

Michael Smith, Advisor to Presiding Member Boyd

STAFF AND CONSULTANTS PRESENT

Caryn Holmes, Legal Counsel

Bob Eller, Project Manager

Lance Shaw, Compliance Project Manager

Mark Hamblin

William Walters

PUBLIC ADVISER

Roberta Mendonca

APPLICANT

Jeffery D. Harris, Attorney
Ellison, Schneider and Harris, LLP

Randy C. Baysinger, Project Manager, Assistant
General Manager
Turlock Irrigation District

Susan Strachan, Principal
Strachan Consulting

Gary S. Rubenstein
Sierra Research

John L. Carrier
Sarah Madams
CH2M HILL

APPLICANT

Jim McLucas
Calpine

Chris Helm
Consultant

ALSO PRESENT

Jim Swaney
San Joaquin Valley Air Pollution Control District

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

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P R O C E E D I N G S

10:10 a.m.

PRESIDING MEMBER BOYD: Good morning, everybody. Welcome to the second evidentiary hearing for the Walnut Energy Center. And as is customary before we begin I'd like to introduce folks around the room, starting with the Committee, consisting of Yours Truly, Jim Boyd, Presiding Commissioner. Commissioner Rosenfeld is unable to be here today.

And then I would like to ask the other people in the room involved in this to introduce themselves. I don't see -- oh, there she is, the Public Adviser, Roberta Mendonca, in the back of the room. Everybody knows Roberta.

Folks from the applicant, would you like to introduce yourselves.

MR. HARRIS: Thank you, Commissioner. My name is Jeff Harris. I'm the counsel for the applicant. Should I introduce our team, as well?

PRESIDING MEMBER BOYD: Please.

MR. HARRIS: To my right is Mr. Randy Baysinger from the District; and to his right is Susan Strachan, Environmental Project Manager. Also in the audience we have several members of

1 our team, John Carrier from CH2M HILL; Sarah
2 Madams, CH2M HILL; Jim McLucas from Calpine
3 Engineering; Chris Helm from -- I think Chris has
4 his own company; and Gary Rubenstein from Sierra.

5 I think that's it.

6 PRESIDING MEMBER BOYD: Thank you.
7 Staff.

8 MS. HOLMES: Good morning, Commissioner.
9 My name is Caryn Holmes; I'm Staff Counsel
10 assigned to this project. On my right is Bob
11 Eller, the Project Manager. In the audience we
12 have Lance Shaw who is the Compliance Project
13 Manager; Mark Hamblin, traffic and transportation
14 for this project; and Will Walters, our air
15 quality witness.

16 PRESIDING MEMBER BOYD: Okay. Is there
17 anyone else in the audience who intends to speak
18 today? Okay, thank you.

19 Well, the Committee scheduled today's
20 hearing in a notice dated September 10th. As
21 explained in that notice we will receive evidence
22 by declaration for the topics that are listed in
23 agenda A attached to the notice.

24 We'll then proceed to testimony from
25 witnesses, and as appropriate, legal argument on

1 the topics listed in agenda item B.

2 Although originally scheduled for today,
3 the compliance and general conditions topic has
4 been continued to October 9th, as I understand;
5 perhaps other items might be, as well.

6 The filing relevant to today's
7 proceedings are, first, staff's FSA part one,
8 which was dated August 8th of this year; and part
9 two, dated August 29th of this year. The
10 applicant's prepared testimony for all topics,
11 dated September 15. Applicant's exhibits
12 submitted September 19th. Staff's addendum to the
13 FSA September 22nd. And documents for official
14 notice identified as exhibits 48 to 54.

15 And with that I'm going to turn handling
16 the procedures over to the Hearing Officer, Mr.
17 Valkosky, if you would, Stan.

18 HEARING OFFICER VALKOSKY: Thank you,
19 Commissioner Boyd. Today's agenda is basically
20 divided in two parts. First we'll conduct
21 evidentiary proceedings on the topics listed on
22 the two agenda A and B. I understand on the
23 agenda A topics that staff will present a witness
24 on traffic and transportation in order to clarify
25 recent developments pertaining to that topic, is

1 that correct?

2 MS. HOLMES: Yes, that is.

3 HEARING OFFICER VALKOSKY: Thank you.

4 And when we get to the land use topic we'll also
5 determine whether there are any objections to
6 taking official notice of the documents identified
7 as exhibits 48 through 54 on the exhibit list.

8 And finally we'll provide an opportunity
9 for public comment at the conclusion of each
10 topic.

11 Right now we've got ten topics to
12 consider taking by declaration. These are listed
13 on agenda A, which I handed out. The way we will
14 proceed for these topics is that I'll introduce
15 each topic and entertain motions from applicant
16 and then staff to move its respective evidence
17 into the evidentiary record.

18 After we've completed that exercise
19 we'll proceed with the witness presentations and,
20 as appropriate, the legal argument for the
21 remaining topics reflected on agenda B. Oral
22 testimony presentations will follow the procedure
23 set forth on page 2 of the evidentiary hearing
24 notice.

25 Are there any questions? Seeing no

1 questions, we'll proceed with the agenda A topics,
2 the first of which is biological resources. Mr.
3 Harris.

4 MR. HARRIS: Good morning, Mr. Valkosky.
5 We will present our witnesses by declaration. In
6 each instance I will reference the prior filings.
7 It's section 1D, as in David, in our prefiled
8 testimony. I'll identify those exhibits so that
9 we can have those moved into evidence.

10 So beginning with biological resources,
11 first an introductory note. I understand staff is
12 going to have some comment on Bio-12. I think the
13 agreement there is that condition will come out
14 based on a letter received from the Fish and
15 Wildlife Service and docketed last week. But I'll
16 leave that to staff. I just wanted to highlight
17 that issue.

18 Prior filings and testimony. Our
19 witnesses in biological resources are Debra Crowe
20 and John Cleckler. I wanted to say Carrier, I
21 knew it wasn't -- John Cleckler. Their prior
22 filings were identified in section 1D as exhibits.

23 Mr. Valkosky, can I just read the
24 exhibit numbers, or do I need to read the entire
25 document names?

1 HEARING OFFICER VALKOSKY: You can just
2 read the exhibit numbers. They're identified on
3 the list.

4 MR. HARRIS: Thank you. Those prior
5 filings are exhibit 1, exhibit 2, exhibit 5,
6 exhibit 12 and exhibit 21.

7 And with that I would move to have this
8 testimony accepted by declaration. Do you want a
9 separate motion on the documents or can I do it
10 all at once?

11 HEARING OFFICER VALKOSKY: No, you can
12 do it all at once.

13 MR. HARRIS: And also move to have the
14 documents admitted into evidence.

15 HEARING OFFICER VALKOSKY: Okay. Before
16 we deal with that, do you have any comment or can
17 the Committee view as acceptable the changes to
18 conditions Bio-8 to 10 as reflected in staff's
19 testimony, exhibit 47?

20 MR. HARRIS: Yes, we find those
21 acceptable.

22 HEARING OFFICER VALKOSKY: Okay. Any
23 objection to the motion?

24 MS. HOLMES: No objection.

25 HEARING OFFICER VALKOSKY: Those

1 documents are admitted.

2 MS. HOLMES: Thank you. Staff's witness
3 in the area of biological resources is Melinda
4 Dorin. She prepared the biological resources
5 testimony of the final staff assessment, which is
6 exhibit 11. And I don't know whether or not the
7 addendum has an exhibit number.

8 HEARING OFFICER VALKOSKY: Yes, it's
9 exhibit 47.

10 MS. HOLMES: And in exhibit 47.
11 Declarations were included in both those
12 documents.

13 Before I move the documents into
14 evidence I would like to concur with the
15 applicant's statement that with the receipt of the
16 letter from the U.S. Fish and Wildlife Service we
17 no longer believe that Bio-12 is necessary.

18 HEARING OFFICER VALKOSKY: Okay.

19 MS. HOLMES: And with that I would ask
20 that those documents be received into the record.

21 HEARING OFFICER VALKOSKY: Any
22 objection?

23 MR. HARRIS: No objection.

24 HEARING OFFICER VALKOSKY: Seeing none,
25 those documents are admitted.

1 Is there any public comment on the topic
2 of biological resources? Seeing none, we'll close
3 the record on that topic.

4 Next, hazardous materials. Mr. Harris.

5 MR. HARRIS: Thank you. Our witnesses
6 for hazardous materials were Karen Parker and
7 Jerry Salamy. The documents in section 1D of
8 their prior filings include exhibit 1, exhibit 14,
9 exhibit 16 and exhibit 10.

10 I would move their testimony be accepted
11 by declaration, and that the exhibits be accepted
12 into evidence.

13 HEARING OFFICER VALKOSKY: Is there
14 objection?

15 MS. HOLMES: No.

16 HEARING OFFICER VALKOSKY: No objection,
17 those documents are admitted.

18 Ms. Holmes.

19 MS. HOLMES: Thank you. Staff's
20 witnesses in the area of hazardous materials were
21 Jeff Lesh and Rick Tyler. Their testimony and
22 declarations were included in the FSA part two,
23 which has been identified as exhibit 46.

24 And with that, I would ask that their
25 testimony be moved into the record based on their

1 declarations.

2 HEARING OFFICER VALKOSKY: Okay. Is the
3 declaration on page two of the FSA which deals
4 with hazmat available? It was --

5 MS. HOLMES: I believe that the
6 declarations are included in exhibit 47, the
7 addendum.

8 HEARING OFFICER VALKOSKY: Okay. Next,
9 I notice that in this hazardous materials
10 treatment staff has basically found the use of
11 anhydrous ammonia as acceptable, is that correct?

12 MS. HOLMES: Yes, it is.

13 HEARING OFFICER VALKOSKY: Is this a
14 shift in staff policy away from the use of aqueous
15 ammonia, or is it something that's peculiar to
16 this case?

17 MS. HOLMES: No. Staff recommendations
18 are based on site-specific factors. And in this
19 particular instance, based on the analysis that
20 the applicant did and the facts having to do with
21 where sensitive receptors are, population
22 locations and things like that, staff believes
23 that the use of the anhydrous ammonia in this
24 particular case is acceptable.

25 HEARING OFFICER VALKOSKY: Okay. And

1 finally, I notice one of the conditions requires a
2 barrier wall around the storage tank capable of at
3 least deflecting small arms fire. I'm just
4 wondering what sort of discussion will go into the
5 determination of what constitutes small arms fire.

6 Is that something that's going to be
7 done?

8 MS. HOLMES: I would hope so, and I hope
9 I'm not involved in that discussion.

10 (Laughter.)

11 HEARING OFFICER VALKOSKY: Okay, thank
12 you. Is there any objection?

13 MR. HARRIS: No, no objection.

14 HEARING OFFICER VALKOSKY: No objection,
15 those documents are admitted.

16 Is there any public comment on the topic
17 of hazardous materials? Seeing none, we'll close
18 the record on that topic.

19 Noise is next. Mr. Harris.

20 MR. HARRIS: Thank you. Our witness for
21 noise, Mr. Mark Bastasch. His prior filings
22 included exhibit 1, exhibit 5 and exhibit 10. I
23 would move for the admission of his testimony and
24 for the admission of those exhibits into evidence.

25 HEARING OFFICER VALKOSKY: Objection?

1 MS. HOLMES: No objection.

2 HEARING OFFICER VALKOSKY: No objection.

3 Mr. Harris, is there any -- let me rephrase that -
4 - does applicant find acceptable the proposed
5 change to noise condition 6 as proposed by staff?

6 MR. HARRIS: Yes, that condition is
7 acceptable.

8 HEARING OFFICER VALKOSKY: Okay. Seeing
9 no objection, we'll admit the aforementioned
10 documents.

11 Ms. Holmes.

12 MS. HOLMES: Thank you. Staff's witness
13 in the area of noise is Mr. Steve Baker; and his
14 testimony was included both in the final staff
15 assessment, exhibit 11, and in the addendum,
16 exhibit 47. And a declaration and statement of
17 qualifications were included therein.

18 And with that I would move that his
19 testimony be accepted into evidence based on the
20 declaration.

21 HEARING OFFICER VALKOSKY: Is there
22 objection?

23 MR. HARRIS: No objection.

24 HEARING OFFICER VALKOSKY: Seeing none,
25 those documents are admitted.

1 Is there public comment on the topic of
2 noise? Seeing none, we'll close the record on
3 that topic.

4 Public health, Mr. Harris.

5 MR. HARRIS: Thank you. Our witness was
6 Mr. John Lowe. His prior filings include exhibit
7 1, exhibit 5 and exhibit 10. I would move the
8 admission of his testimony and those exhibits.

9 HEARING OFFICER VALKOSKY: Are staff's
10 proposed changes to condition PublicHealth-1
11 acceptable to applicant?

12 MR. HARRIS: Yes, they are.

13 HEARING OFFICER VALKOSKY: Is there
14 objection?

15 MS. HOLMES: No objection.

16 HEARING OFFICER VALKOSKY: No objection,
17 the documents are admitted.

18 Ms. Holmes.

19 MS. HOLMES: Thank you. Staff's
20 witnesses on public health were Mr. Walters, Ms.
21 Blewitt and Dr. Odoemelum. Their testimony is
22 included in the public health sections of exhibit
23 111 and exhibit 47, as well as a statement of
24 their qualifications and declarations.

25 With that, I would move that their

1 testimony be admitted into the record.

2 HEARING OFFICER VALKOSKY: Objection,
3 Mr. Harris?

4 MR. HARRIS: No objection.

5 HEARING OFFICER VALKOSKY: No
6 objections.

7 Any public comment on this topic?
8 Seeing on public comment, we'll receive the
9 documents and close the record on that topic.

10 Socioeconomics.

11 MR. HARRIS: Thank you, Mr. Valkosky.
12 Our witness is Fatima Yusuf, PhD. Prior filings
13 include exhibit 1, exhibit 2 and exhibit 10. I
14 would move into evidence this testimony and those
15 exhibits.

16 HEARING OFFICER VALKOSKY: Objection?

17 MS. HOLMES: No objection.

18 HEARING OFFICER VALKOSKY: The documents
19 are received.

20 Staff?

21 MS. HOLMES: Staff's witness in the area
22 of socioeconomic is Dr. Joe Diamond. His
23 testimony, qualifications and a declaration were
24 included in exhibit 11.

25 I would move his testimony be entered

1 into the record at this time.

2 HEARING OFFICER VALKOSKY: Objection?

3 MR. HARRIS: No objection.

4 HEARING OFFICER VALKOSKY: The document
5 is received.

6 Is there any public discussion on the
7 topic of socioeconomics? Seeing none, the record
8 is closed on that topic.

9 Traffic and transportation, Mr. Harris.

10 MR. HARRIS: I think this is one where
11 we're going to have a staff witness. Should we
12 defer to staff?

13 MS. HOLMES: Maybe staff should go
14 first.

15 HEARING OFFICER VALKOSKY: Okay.

16 MS. HOLMES: What I'd like to do
17 actually would be to move the prefiled testimony
18 into the record, and then just have Mr. Hamblin
19 testify here about the recent developments and
20 what staff's response to that is.

21 So, with that, I'd note that the
22 testimony of Mr. Hamblin and Ms. Allen is included
23 in both exhibit 111 and exhibit 47.

24 HEARING OFFICER VALKOSKY: Exhibit 11,
25 not 111.

1 MS. HOLMES: Excuse me. I'm glad there
2 aren't that many exhibits.

3 HEARING OFFICER VALKOSKY: You're not
4 the only one.

5 (Laughter.)

6 MS. HOLMES: Along with declaration and
7 statement of their qualifications. So with that,
8 I would move that that testimony be entered into
9 the record.

10 HEARING OFFICER VALKOSKY: Any
11 objection?

12 MR. HARRIS: No objection.

13 HEARING OFFICER VALKOSKY: Those
14 documents are admitted.

15 MS. HOLMES: Thank you. By way of
16 background staff received a letter that was dated
17 September 18, 2003, from the Stanislaus County
18 Airport Land Use Commission making a number of
19 recommendations relative to the project.

20 The recommendations had previously been
21 reviewed by Mr. Hamblin. And I'd like him just to
22 provide a quick response to the letter for the
23 Committee's consideration.

24 HEARING OFFICER VALKOSKY: Do you want
25 your witness sworn?

1 MS. HOLMES: That would be a good idea.

2 Whereupon,

3 MARK HAMBLIN

4 was called as a witness herein, and after first
5 having been duly sworn, was examined and testified
6 as follows:

7 MS. HOLMES: And I presume I don't need
8 to have him restate his qualifications.

9 HEARING OFFICER VALKOSKY: Your
10 presumption is correct.

11 DIRECT EXAMINATION

12 BY MS. HOLMES:

13 Q Mr. Hamblin, have you reviewed a letter
14 from the Stanislaus County Airport Land Use
15 Commission dated September 18, 2003?

16 A I have.

17 Q Can you briefly summarize the concerns
18 that were expressed in that letter?

19 A The concerns that have been expressed
20 pertain to the airport plan, the County's airport
21 plan for area 4, which is around the Turlock Air
22 Park, which is at the south part of Turlock.

23 The planner that was assigned to the
24 project reviewed this project, the Walnut Energy
25 Center, and presented us with a letter outlining

1 some recommended issues, but not stating that they
2 were going to be specific requirements. Something
3 for us to consider.

4 Staff reviewed these concerns as
5 expressed in the letter, and staff has concluded
6 that where the environmental issues are presented,
7 such as there have been soundproofing of
8 buildings; electromagnetic transmission concerns
9 that were identified, potentially identified;
10 limits on flashing and animated signs; use of
11 nonreflective construction materials; underground
12 storage of volatile or flammable liquids; and the
13 granting of a navigation easement.

14 In these concerns at least five of the
15 bullet points, staff feels are environmental
16 issues, are more than addressed during the normal
17 course of our proceedings, and requirements
18 through our mitigations and standard conditions.

19 The question that remained was the
20 granting of a navigation easement which is not a
21 mitigating document. Essentially it is a legal
22 document that identifies, that goes to the
23 proprietor of the airport by the grantee, which
24 would be the applicant. TID would grant to the
25 proprietor of the airport notification

1 acknowledging that yes, we are in this proximity
2 of an airport; and that we recognize that as a
3 result of the airport, there are nuisances,
4 inconveniences, discomforts associated with it in
5 its normal operations.

6 Having had some past experience with
7 dealing with this at the local level, staff would
8 feel that we more than addressed the issues. And
9 that actually the navigation easement is not
10 necessary at this time unless the applicant
11 chooses to provide it. But staff doesn't see the
12 need for it.

13 HEARING OFFICER VALKOSKY: How far is
14 the airport from the project site?

15 MR. HAMBLIN: Approximately three and a
16 half miles.

17 HEARING OFFICER VALKOSKY: Three and a
18 half miles, okay. Thank you.

19 PRESIDING MEMBER BOYD: Is there
20 precedent for navigation easements?

21 MR. HAMBLIN: Not as in statewide, no.
22 They have -- the FAA's basic statement is that
23 they don't recommend them. But if you have them,
24 keep them.

25 And most jurisdictions, to prevent,

1 again for particularly residences that live near
2 the airport that may be hearing that plane at
3 10:00 p.m. Or the revving up of an engine because
4 an aviation facility is working on the repair of
5 an engine.

6 Some of these discomforts tend to
7 generate some significant issues to the residents
8 or nearby people. And the concern by the
9 proprietor of the airport, whether it be public or
10 privately owned -- in this case this is a
11 privately owned facility -- is that, hey, we don't
12 want to get stuck in nuisance lawsuits just
13 because we're doing our normal course of
14 operations.

15 And so this is an attempt that had been
16 adopted by other counties throughout the state,
17 and other cities, to help out at least the airport
18 in these concerns.

19 Now, it doesn't prohibit anybody if
20 they're going above what are deemed normal
21 operations from filing some appropriate complaint
22 with the airport. Or potentially, if it can't be
23 resolved at the administrative level, whatever
24 that may be, to proceed down some sort of legal
25 action.

1 Or it doesn't prohibit an individual
2 that may be flying an airplane over a house and a
3 beer can flies out, from getting the number of the
4 plane and contacting the FAA at that point.

5 But the key here is that there are
6 normal operations associated with the airport. As
7 a result of that, there are normal discomforts
8 associated with it. And one party is informing
9 the other that, hey, you've come into the area,
10 this is our area, it's the airport, and we want to
11 make you aware of the situation.

12 PRESIDING MEMBER BOYD: Thank you.

13 BY MS. HOLMES:

14 Q Mr. Hamblin, having reviewed the letter,
15 is your conclusion still as you stated in the FSA,
16 that is that the project complies with applicable
17 LORS?

18 A Yes.

19 Q And that the project does not create any
20 significant adverse unmitigated impacts?

21 A Yes.

22 MS. HOLMES: Thank you.

23 HEARING OFFICER VALKOSKY: Mr. Harris.

24 MR. HARRIS: Thank you, no questions for
25 this witness.

1 HEARING OFFICER VALKOSKY: Okay. Thank
2 you, sir.

3 Ms. Holmes, has that letter been
4 docketed, because I've not seen a copy of it.

5 MS. HOLMES: Yes, the docket date is
6 September 26, 2003.

7 HEARING OFFICER VALKOSKY: Okay, thank
8 you.

9 Mr. Harris, your traffic witness.

10 MR. HARRIS: For my clarification I
11 don't recall whether the documents Ms. Holmes
12 introduced were accepted into evidence or not.

13 HEARING OFFICER VALKOSKY: Well, if they
14 weren't they certainly should have been.

15 MS. HOLMES: I agree.

16 (Laughter.)

17 MS. HOLMES: Consider that a motion.

18 HEARING OFFICER VALKOSKY: Consider that
19 acceptance of the portions of exhibits 11 and 47.

20 MR. HARRIS: No objection.

21 Traffic and transportation, Mr.
22 Valkosky. Our witness is Jeannie Acutanzsa and
23 Susan Strachan. The exhibits include exhibit 1,
24 exhibit 5, exhibit 10 and exhibit 23. I'd move
25 the admission of the testimony and those exhibits.

1 HEARING OFFICER VALKOSKY: Okay. Does
2 applicant find acceptable the proposed changes
3 contained in staff's exhibit 47?

4 MR. HARRIS: Yes, we do.

5 HEARING OFFICER VALKOSKY: Is there
6 objection?

7 MS. HOLMES: No objection.

8 HEARING OFFICER VALKOSKY: No objection,
9 those documents are admitted.

10 Mr. Harris, since the topic's been
11 broached, does applicant intend to go through with
12 an easement, an airport easement, or not?

13 MR. HARRIS: I'd like Mr. Baysinger to
14 respond, please.

15 HEARING OFFICER VALKOSKY: Certainly.
16 Mr. Baysinger.

17 MR. HARRIS: I'm sorry, I'm not sure I
18 have the question in mind. Is it the airport
19 easement or the transportation easement?

20 HEARING OFFICER VALKOSKY: I'm sorry,
21 the transportation easement.

22 MR. HARRIS: Okay, the transportation
23 easement.

24 MR. BAYSINGER: Yes, we'll be securing
25 those easements.

1 HEARING OFFICER VALKOSKY: Okay. Second
2 part of the question. How about the aviation and
3 hazard easement?

4 MR. BAYSINGER: I would say no at this
5 time. The absence of an easement would not
6 preclude them from flying over us. And I think
7 since we will be preparing a security plan, it
8 probably is not a wise thing to be granting
9 airflights over our facility with permission,
10 although they would not be precluded from doing so
11 anyway.

12 HEARING OFFICER VALKOSKY: Is there, in
13 your opinion, any way that the normal operation of
14 the airport would interfere with the operation of
15 the Energy Center?

16 MR. BAYSINGER: No. It's an airport
17 with a small runway; it's privately owned. So,
18 it's just small aircraft only.

19 HEARING OFFICER VALKOSKY: Okay, thank
20 you. Any further comments from anyone on the
21 topic of traffic and transportation? Seeing none,
22 we'll close the record on that topic.

23 Transmission line safety and nuisance,
24 Mr. Harris.

25 MR. HARRIS: Thank you. Our witness is

1 Brian LaFollette. And Brian's prior filings
2 include exhibit 1, exhibit 17 and exhibit 22. I
3 would move his testimony and those exhibits.

4 HEARING OFFICER VALKOSKY: Objection?

5 MS. HOLMES: No objection.

6 HEARING OFFICER VALKOSKY: Those
7 documents are admitted. Mr. Harris, does
8 applicant find acceptable staff's proposed changes
9 to condition 1?

10 MR. HARRIS: Yes, we do.

11 HEARING OFFICER VALKOSKY: Thank you.

12 Ms. Holmes.

13 MS. HOLMES: Thank you. Staff's witness
14 in the area of transmission line safety and
15 nuisance is Dr. Odoemelum. His testimony was
16 included in exhibit 11 and exhibit 47, along with
17 a statement of his qualifications and
18 declarations.

19 I would move at this point that those
20 documents be received into evidence.

21 HEARING OFFICER VALKOSKY: Is there
22 objection?

23 MR. HARRIS: No objection.

24 HEARING OFFICER VALKOSKY: Hearing none,
25 we'll admit those documents.

1 Is there public comment on the topic of
2 transmission line safety and nuisance? Seeing
3 none, we'll close the record on that topic.

4 Transmission system engineering, Mr.
5 Harris.

6 MR. HARRIS: Yes. Our witness is Ron
7 Daschmans. And his prior filings include exhibit
8 1, exhibit 15 and exhibit 17. I would move his
9 testimony on those exhibits.

10 HEARING OFFICER VALKOSKY: Objection?

11 MS. HOLMES: No objection.

12 HEARING OFFICER VALKOSKY: Hearing no
13 objection, portions of those exhibits are
14 admitted.

15 Staff.

16 MS. HOLMES: Thank you. Staff's
17 witnesses in the area of transmission system
18 engineering -- I can't even pronounce the first
19 witness' name, I apologize. A-r-a-c-h-c-h-i-g-e,
20 thank you, -- Bucaneg and Mr. McCuen. That
21 testimony was included in the FSA part one, which
22 is exhibit 11, along with statements of their
23 qualifications and declarations.

24 And I would move that that evidence be
25 received into the record at this time.

1 HEARING OFFICER VALKOSKY: Is there
2 objection?

3 MR. HARRIS: No objection.

4 HEARING OFFICER VALKOSKY: No objection.
5 Those documents are admitted.

6 Is there any public comment on the topic
7 of transmission system engineering? Seeing none,
8 we'll close the record on that topic.

9 Next, facility design. This was
10 originally identified as one of the topics that
11 may need to be litigated. My current
12 understanding is, though, that the parties have
13 reached accommodation on that, is that correct,
14 Mr. Harris?

15 MR. HARRIS: Yes, that is correct, Mr.
16 Valkosky.

17 HEARING OFFICER VALKOSKY: Okay.

18 MR. HARRIS: Our witness would be James
19 McLucas. And his prior filings include exhibit 1,
20 exhibit 13, exhibit 17, exhibit 10 and exhibit 20.
21 I would move Mr. McLucas' testimony and those
22 exhibits.

23 HEARING OFFICER VALKOSKY: Okay, is
24 there objection?

25 MS. HOLMES: No objection.

1 HEARING OFFICER VALKOSKY: Being none,
2 those exhibits are accepted. I take it, Mr.
3 Harris, that means that applicant agrees with the
4 changes as reflected in exhibit 47?

5 MR. HARRIS: Yes, those are acceptable.

6 HEARING OFFICER VALKOSKY: Okay, thank
7 you. Ms. Holmes?

8 MS. HOLMES: Thank you. Staff's
9 witnesses in the area of facility design are Mr.
10 Khoshmashrab, Al McCuen and Mr. Baker. Their
11 testimony was included in exhibit 11 and in
12 exhibit 47, along with statements of their
13 qualifications and declarations.

14 I would move that that evidence be
15 received into the record at this time.

16 HEARING OFFICER VALKOSKY: Objection?

17 MR. HARRIS: No objection.

18 HEARING OFFICER VALKOSKY: Seeing no
19 objection, those documents are admitted.

20 Is there any public comment on the topic
21 of facility design? Seeing none, we'll close the
22 record on that topic.

23 Final topic on agenda A is visual
24 resources. Again, Mr. Harris, this is one of
25 those topics which potentially required

1 adjudication. Am I correct in understanding that
2 it is now a stipulated topic?

3 MR. HARRIS: You are correct.

4 HEARING OFFICER VALKOSKY: Okay.

5 Proceed.

6 MR. HARRIS: Our witness is Wendy Haden;
7 and her prior filings include exhibit 1, exhibit
8 2, exhibit 6, exhibit 8, exhibit 13 and exhibit
9 10. I would move, at this point, Ms. Hayden's
10 testimony and those exhibits into evidence.

11 HEARING OFFICER VALKOSKY: Ms. Holmes,
12 objection?

13 MS. HOLMES: No objection.

14 HEARING OFFICER VALKOSKY: Seeing no
15 objection, those documents are admitted into
16 evidence.

17 We've completed moving documents for
18 this portion of the --

19 MS. HOLMES: Can we get our visual
20 resources testimony in?

21 HEARING OFFICER VALKOSKY: I'm sorry,
22 I'm sorry, certainly. Actually, just a minute.
23 Mr. Harris, we've also got exhibit 45. Were you
24 going to move that later, or are you going to move
25 those portions in at this time. That was your

1 September 15th filing, the testimony on all the
2 topics.

3 MR. HARRIS: Yes. I'd like to move
4 exhibit 45 be admitted in its entirety.

5 HEARING OFFICER VALKOSKY: Okay. Is
6 there objection? Ms. Holmes, any objection?

7 MS. HOLMES: Including the sections that
8 we haven't discussed yet?

9 HEARING OFFICER VALKOSKY: No, those
10 portions that we've covered.

11 MS. HOLMES: Oh. No objection.

12 HEARING OFFICER VALKOSKY: No objection.
13 That's received.

14 Okay, staff.

15 MS. HOLMES: Staff's witness in the area
16 of visual resources is Eric Knight. His testimony
17 was included both in exhibit 22 and in exhibit 47,
18 along with a statement of his qualifications and
19 declarations. I would move that his testimony be
20 received into evidence at this time.

21 HEARING OFFICER VALKOSKY: Okay. I note
22 in exhibit 47, I assume it's just a typo right
23 under the heading it says you're changing Vis-1
24 and Vis-2. I assume that's actually Vis-2 and
25 Vis-4?

1 MS. HOLMES: I believe that's correct.

2 Yes, that's correct.

3 HEARING OFFICER VALKOSKY: Is that
4 correct?

5 MS. HOLMES: Yes.

6 HEARING OFFICER VALKOSKY: Okay, fine.
7 Is there objection?

8 MR. HARRIS: No objection.

9 HEARING OFFICER VALKOSKY: Great, those
10 documents are admitted.

11 Is there any public comment on the topic
12 of visual resources? Seeing none, we'll close the
13 record on that topic. And actually that finishes
14 up agenda A.

15 Proceeding now to the agenda B topics.
16 And before we begin I'd just like to poll the
17 parties. Are we going to do anything on soil and
18 water today, or is that going to be continued?

19 MS. HOLMES: My understanding is that
20 that's going to be continued. We do have an
21 agreement on all issues associated with soil and
22 water, but we are working over the last little
23 details of the language. But there is an
24 agreement. We fully expect that on the 9th that
25 will be able to be taken by declaration.

1 HEARING OFFICER VALKOSKY: And that is
2 all of the elements of soil and water, is that
3 correct?

4 MS. HOLMES: That's correct.

5 HEARING OFFICER VALKOSKY: Mr. Harris?

6 MR. HARRIS: Yeah, I concur in that
7 assessment.

8 HEARING OFFICER VALKOSKY: Okay, so
9 we'll put that one over a long with compliance.

10 The other one that we have is
11 alternatives. My practice is I like that as the
12 last topic. We could put that over to the 9th or
13 we could do it today. What is the preference of
14 the parties?

15 MS. HOLMES: Since we have no questions
16 of the applicant's alternatives witness, and I
17 believe the applicant has no questions of our
18 witness, and everyone's here, I would suggest we
19 simply get it out of the way and move forward.

20 HEARING OFFICER VALKOSKY: Is that
21 suitable to you, Mr. Harris?

22 MR. HARRIS: Yeah, that's actually
23 preferable.

24 HEARING OFFICER VALKOSKY: Okay, we'll
25 do that as the last of the topics today then. And

1 I assume, process of elimination, that leaves us
2 land use and air quality. Is everyone set to
3 proceed on those two, today?

4 MS. HOLMES: Yes.

5 MR. HARRIS: Yes, we are.

6 HEARING OFFICER VALKOSKY: Okay. Next
7 topic, then, land use. Mr. Harris.

8 MS. HOLMES: I'm wondering whether we
9 should be putting our testimony into the record
10 first and then having the oral argument, so that
11 the factual basis is established.

12 MR. HARRIS: I was actually wondering
13 whether we should do air quality first --

14 MS. HOLMES: Oh, --

15 MR. HARRIS: -- sorry.

16 (Laughter.)

17 MR. HARRIS: Since I have only one
18 witness who has to stay through the proceedings.
19 And I'm sure Mr. Rubenstein would love to hear us
20 give an oral argument, but it probably wouldn't
21 hurt his feelings not to have to sit through that,
22 so.

23 HEARING OFFICER VALKOSKY: I have no
24 objection to doing that. The question I have from
25 the prefiled materials is that in land use there

1 was the question of whether applicant was putting
2 on a witness; whether staff was going to have some
3 presentation from the Department of Conservation.
4 What are we doing with that?

5 MS. HOLMES: We agreed to have the
6 testimony of both parties go in by declaration,
7 and simply limit the discussion here today to an
8 oral argument on the legal issue.

9 HEARING OFFICER VALKOSKY: Correct, Mr.
10 Harris?

11 MR. HARRIS: That is correct, although I
12 will need some additional time at the beginning to
13 lay out the factual basis that would have been
14 laid out by our witnesses, --

15 HEARING OFFICER VALKOSKY: Okay.

16 MR. HARRIS: -- but that is correct,
17 yes.

18 HEARING OFFICER VALKOSKY: All right.
19 Well, unless someone's got an objection, we can
20 certainly do that after air quality. No
21 objections?

22 MR. HARRIS: No objection.

23 HEARING OFFICER VALKOSKY: We'll do that
24 after air quality. Okay, Mr. Harris.

25 MR. HARRIS: Thank you. We will bring

1 Mr. Rubenstein forward.

2 MS. HOLMES: Can I ask a question? When
3 is the District going to be testifying?

4 MR. HARRIS: Can we be off the record
5 for a moment, please?

6 HEARING OFFICER VALKOSKY: Certainly,
7 off the record.

8 (Off the record.)

9 HEARING OFFICER VALKOSKY: Mr. Harris.

10 MR. HARRIS: Yes, first witness would be
11 Jim Swaney from the Air District. I'd ask that
12 the witness be sworn.
13 Whereupon,

14 JIM SWANEY

15 was called as a witness herein, and after first
16 having been duly sworn, was examined and testified
17 as follows:

18 DIRECT EXAMINATION

19 BY MR. HARRIS:

20 Q Thank you, Mr. Swaney. You're here to
21 discuss the topic of air quality, is that correct?

22 A That is correct.

23 Q And the District was responsible for the
24 preparation of the PDOC and the FDOC for the
25 Walnut Energy Center, is that correct?

1 A That is correct.

2 Q And these documents which you either
3 prepared or you have knowledge of the facts
4 therein, is that correct?

5 A That is correct.

6 Q And could you please briefly summarize
7 for the Committee your professional and
8 educational qualifications?

9 A Sure. This is actually the first time
10 I've ever been asked that question.

11 (Laughter.)

12 MR. SWANEY: I have a bachelors degree
13 in aerospace engineering; a certificate of air
14 quality management from UC San Diego Extension;
15 and I'm a licensed mechanical engineer here in the
16 state.

17 I have been in the environmental
18 business for over 13 years; 10 of those specific
19 to air quality. I've been with the Air District
20 since October of '97 and have managed our northern
21 region permitting office since the beginning of
22 2001.

23 BY MR. HARRIS:

24 Q Thank you. Could you now please provide
25 a summary of your testimony.

1 A Sure. We reviewed the applicant's
2 application to us; have determined that their
3 proposed project complies with all of our rules
4 and regulations including best available control
5 technology, offsets; have satisfied all public
6 noticing. And that's pretty much the summary of
7 my testimony.

8 Q Mr. Swaney, have you reviewed the ERC
9 package for the Walnut Energy Center?

10 A Yes, I have.

11 Q And do you find that package to be
12 acceptable?

13 A Yes, it is.

14 MR. HARRIS: The witness is available
15 for cross-examination.

16 HEARING OFFICER VALKOSKY: Before we get
17 to that, Mr. Swaney, what's the limit on ammonia
18 slip?

19 MR. SWANEY: Ten ppm.

20 HEARING OFFICER VALKOSKY: And is that
21 the level at which you have issued the FDOC for
22 the proposed project?

23 MR. SWANEY: Yes, it is.

24 HEARING OFFICER VALKOSKY: There was
25 some discussion between staff and applicant about

1 two of the ERC certificates. Are you familiar
2 with that?

3 MR. SWANEY: Yes, I am.

4 HEARING OFFICER VALKOSKY: Can you
5 explain to me, in the District's estimation, the
6 status of these certificates? In other words,
7 when will they be surrendered and what form will
8 they be surrendered and how does the District
9 determine if they are valid when they are
10 surrendered?

11 MR. SWANEY: Well, for any of the
12 emission reduction credits that they are proposing
13 our requirement is that they be surrendered prior
14 to the initial operation of the project.

15 Any changes to the package would have to
16 go through a new public notice. As far as whether
17 or not they are valid, we do consider all emission
18 reduction certificates within our bank to be
19 valid. Our position has been that regardless of
20 EPA's concerns. To us all of our credits are
21 valid.

22 We are working with EPA to address their
23 concerns, but unless EPA comes right out and says
24 that they cannot be used, and we would agree to
25 that, they remain valid.

1 HEARING OFFICER VALKOSKY: Okay. Are
2 you familiar with the May 29th letter from EPA to
3 the District regarding, I believe it's comments on
4 the PDOC?

5 MR. SWANEY: Yes, I am.

6 HEARING OFFICER VALKOSKY: Okay, now
7 part of that letter states, and I'm reading from
8 the second paragraph, --

9 MR. HARRIS: Mr. Valkosky, is that an
10 exhibit?

11 HEARING OFFICER VALKOSKY: Yes, it is;
12 it's exhibit 36.

13 MR. HARRIS: Exhibit 36?

14 HEARING OFFICER VALKOSKY: Yes.

15 MR. HARRIS: Okay, thank you.

16 HEARING OFFICER VALKOSKY: Okay, do you
17 have a copy of that?

18 MR. SWANEY: Yes, I do.

19 HEARING OFFICER VALKOSKY: Okay. If you
20 go down to the last line of the second paragraph.
21 It says: We need to receive verification that the
22 ERC is indeed owned by TID and not used by the
23 Pastoria Power Plant to insure that the ERC is
24 valid for TID's project."

25 Can you explain to me whether the

1 District has, in fact, done that verification?

2 MR. SWANEY: Yes, we have. And our
3 verification of that was in our letter back to the
4 EPA responding to this. I believe that letter has
5 been docketed.

6 HEARING OFFICER VALKOSKY: Okay, what's
7 the exhibit number of that letter?

8 MR. HARRIS: We'll get that for you.

9 HEARING OFFICER VALKOSKY: Okay. Is it
10 exhibit 40, possibly?

11 MR. HARRIS: It's exhibit 40.

12 HEARING OFFICER VALKOSKY: Okay, now if
13 you'll go down on exhibit 36 to the last full
14 paragraph on the first page. You go to the second
15 sentence which states, quote, "Our comments
16 explain the changes necessary to correctly include
17 the credits and the emissions inventory for the
18 PM10 plan."

19 Has the District complied with EPA's
20 comments in that regard?

21 MR. SWANEY: We are still in discussions
22 with the Environmental Protection Agency on this
23 issue. Our position all along has been that we
24 have correctly identified all of these credits in
25 all of our attainment plans.

1 My boss, Sayed Sadredin, last spoke with
2 EPA on Friday regarding our latest language for
3 inclusion in these plans. They believe that they
4 will approve this with just some minor language
5 clarifications. But until they actually come out
6 and say something there's really, you know,
7 they've submitted comments, we say everything is
8 fine. All we have at this point is a verbal
9 preliminary approval.

10 HEARING OFFICER VALKOSKY: What happens
11 if the District and EPA do not agree, or at least
12 continue to disagree and it comes time for Walnut
13 to go online and certificates to be surrendered?

14 MR. SWANEY: For compliance with our
15 rules we would accept the ERC package as has been
16 proposed. There is the potential that the
17 Environmental Protection Agency may, at that time,
18 take their own independent action.

19 So it would be up to the applicant as to
20 whether or not they would want to revise their ERC
21 package.

22 HEARING OFFICER VALKOSKY: Okay, but the
23 District, in that instance at least, would act
24 potentially regardless of what the EPA had
25 determined, is that correct?

1 MR. SWANEY: Correct.

2 HEARING OFFICER VALKOSKY: Okay, so in
3 terms of validity of an ERC certificate, is it
4 fair to say that the District is controlled -- or
5 views itself as controlled by its own rules --

6 MR. SWANEY: Yes.

7 HEARING OFFICER VALKOSKY: --
8 exclusively?

9 MR. SWANEY: Yes.

10 HEARING OFFICER VALKOSKY: Okay, thank
11 you.

12 Ms. Holmes, cross-examination?

13 CROSS-EXAMINATION

14 BY MS. HOLMES:

15 Q Good morning, Mr. Swaney.

16 A 'Morning.

17 Q When you were preparing the DOC for this
18 project did you evaluate the potential for ammonia
19 slip to contribute to secondary particulates?

20 A No, we did not.

21 Q So the identification of 10 parts per
22 million as the appropriate level isn't based on
23 any concerns about secondary particulate?

24 A I wouldn't quite put it that way. We
25 feel that controlling the NOx emissions is more

1 important than any secondary particulate that may
2 be formed from 10 ppm ammonia versus 5 ppm.

3 Q Is it your -- when you say that it's
4 more important to control the NOx emissions are
5 you suggesting that the NOx emissions would be
6 higher if the ammonia slip level were 5 ppm?

7 A No, we are not. What we are saying is
8 that we want to insure that the NOx limits are met
9 without being unduly prescriptive on other issues
10 where we don't feel that there is that much of an
11 issue.

12 Q But the NOx level of 2 parts per million
13 could be met with a 5 parts per million ammonia
14 slip?

15 A My understanding is yes.

16 Q What is the 10 parts per million based
17 on?

18 A That is our District practice and has
19 been for a number of years.

20 Q Is there an air quality or a public
21 health basis for that?

22 A Well, what we do for any project we do
23 run a modeling on the ammonia emissions to see if
24 the ammonia, itself, would cause an exceedance, or
25 I guess we'd say would be over our risk management

1 thresholds.

2 Q Are these, I think they're called health
3 indexes or hazard indexes, --

4 A Health --

5 Q -- and you look for them to be less than
6 1, is that correct?

7 A Yes. Health hazard indices, yes.

8 Q And is a 10 parts per million ammonia
9 slip level required to get to a health index of
10 less than 1?

11 A It does result in a health index of less
12 than 1.

13 Q Wouldn't also much higher ammonia slip
14 levels?

15 A Potentially. I don't have that data
16 with me.

17 Q When you established your BACT rules for
18 NOx, did you consider the secondary effects
19 associated with the control technologies?

20 A To a limited extent, we do.

21 Q Did you consider the secondary effects
22 of ammonia slip?

23 A No, we did not.

24 Q Has the District ever done a cost
25 effectiveness analysis comparing 5 parts per

1 million versus 10 parts per million ammonia slip?

2 A No, we have not.

3 Q Thank you. I just want to ask a couple
4 of questions in followup to Mr. Valkosky's
5 questions on rule 2201.

6 If I understood you correctly it is the
7 District's position that the two ERCs that have
8 been identified by staff, that in fact that
9 they're valid?

10 A That's correct.

11 Q And you would continue to believe that
12 they are valid even if the EPA does not approve
13 rule 2201?

14 A That is correct.

15 Q Does the District have an EPA-approved
16 severe ozone attainment plan?

17 A No, we do not.

18 Q Do you have a fully approved moderate
19 PM10 attainment plan?

20 A No, we do not.

21 Q When was the last time the District ever
22 had a fully approved ozone attainment plan?

23 A I don't have that with me, but it has
24 been a number of years.

25 Q Okay, thank you.

1 MS. HOLMES: I think those are all my
2 questions.

3 HEARING OFFICER VALKOSKY: Thank you.

4 MR. HARRIS: No redirect.

5 HEARING OFFICER VALKOSKY: Thank you,
6 Mr. Swaney.

7 Mr. Harris, could you again clarify for
8 me the extent of the dispute. Staff has made in
9 exhibit 47 some changes, and I would like you,
10 before you begin with Mr. Rubenstein, to clarify
11 whether we're talking about the construction
12 mitigation in addition to conditions AQC6 and 8,
13 or whether a lot of the construction mitigation
14 disagreement has been taken off the table.

15 MR. HARRIS: Yes. It will be more clear
16 in Mr. Rubenstein's testimony, but my
17 understanding is the construction, that AQC1
18 through 5, that there's agreement on those
19 construction measures.

20 There's still disagreement on AQC6.
21 There's still disagreement on AQC8. And my
22 understanding is we also have -- back to
23 agreements -- there's an agreement on AQ47, which
24 was also a disputed issue.

25 So all we're left with is AQC6 and 8.

1 HEARING OFFICER VALKOSKY: Which are
2 basically the ammonia slip and the ERCs, right?

3 MR. HARRIS: Correct.

4 HEARING OFFICER VALKOSKY: Okay, now
5 where is the agreement on AQ47 reflected? Is that
6 reflected in staff's testimony?

7 MR. HARRIS: It's reflected in a
8 document that Mr. Rubenstein wisely brought with
9 him, and I think we have copies of.

10 MS. HOLMES: We'll read it into the
11 record. It's a very very minor change.

12 HEARING OFFICER VALKOSKY: Okay. All
13 right, thanks for the clarifications.

14 MS. HOLMES: If Mr. Rubenstein wants to
15 propose it formally on the record, then staff can
16 agree to it when we testify, in turn.

17 (Laughter.)

18 MR. HARRIS: The one golden copy.

19 HEARING OFFICER VALKOSKY: At least no
20 one's prompting anyone else, so -- proceed, Mr.
21 Harris.

22 MR. HARRIS: Thank you. I would ask
23 that the witness be sworn.

24 Whereupon,

25 GARY RUBENSTEIN

1 was called as a witness herein, and after first
2 having been duly sworn, was examined and testified
3 as follows:

4 DIRECT EXAMINATION

5 BY MR. HARRIS:

6 Q Would you please state your name for the
7 record.

8 A Yes, my name is Gary Rubenstein.

9 Q And what subject matter are you here to
10 testify on today?

11 A Testify on the subject of air quality.

12 Q And were the documents that you
13 sponsored as part of your prefiled testimony
14 identified as a part of attachment 1 to your
15 testimony?

16 A Yes, they were.

17 Q And do you have any changes, corrections
18 or clarifications to your testimony?

19 A Only with respect to agreements that
20 have been reached regarding various conditions,
21 and I'll discuss those shortly.

22 Q Thank you. Now, were these documents
23 either prepared by you or at your direction?

24 A Yes, they were.

25 Q And are the facts stated therein true to

1 the best of your knowledge?

2 A Yes, they are.

3 Q And are the opinions stated therein your
4 own?

5 A Yes, they are.

6 Q And do you adopt this as your testimony
7 for this proceeding?

8 A Yes, I do.

9 MR. HARRIS: Mr. Valkosky, there are a
10 number of exhibits in prefiled testimony beginning
11 on page 20 of our prefiled testimony. Should I
12 read all those numbers, or should we just note the
13 page numbers?

14 HEARING OFFICER VALKOSKY: No, I think,
15 unless there's objection, just note the page
16 numbers, because as I see it, it's two full pages,
17 is that correct?

18 MR. HARRIS: That is correct.

19 MS. HOLMES: No objection.

20 MR. HARRIS: Thank you for sparing me.
21 So the prefiled testimony, again, is identified as
22 attachment 1 to Mr. Rubenstein's testimony, I
23 believe, on pages 20 and 21 of the hard copy.

24 I'm just going to ask Mr. Rubenstein to
25 briefly summarize his qualifications.

1 BY MR. HARRIS:

2 Q Could you do that for us, Gary?

3 A Yes. I have a bachelor of science
4 degree in engineering from CalTech. I have over
5 30 years of experience in the field of air
6 pollution research and control. I have
7 participate in a number of proceedings before the
8 California Energy Commission where I've testified
9 as an expert witness on the topic of air quality.
10 Those are detailed in my written testimony.

11 Q Okay, thank you. Let's turn now to your
12 testimony. Can you please provide a short summary
13 of your testimony; and if you would, I'd like you
14 to focus on both local and regional air quality
15 issues. So would you please summarize your
16 testimony.

17 A Yes. In our analysis of the Walnut
18 Energy Center's impacts we took a look at
19 compliance with applicable LORS, and as well,
20 potential air quality impacts under CEQA.

21 With respect to LORS we concluded that
22 the project would, in fact, comply with all
23 applicable LORS without exception; and the basic
24 elements of that compliance included satisfying
25 the requirements of the San Joaquin Valley Air

1 District's rules, particularly with respect to
2 best available control technology and the
3 provision of emission reduction credits.

4 With respect to our analysis under CEQA,
5 we took a look at both local and regional air
6 quality impacts. With respect to local air
7 quality impacts there were three principal
8 elements to our analysis.

9 The first was to insure that the project
10 uses best pollution controls available because
11 that is, in all cases, the best way to minimize
12 localized impacts of any project. And I believe
13 that Walnut Energy Center does that.

14 Second part of our analysis was the
15 performance of an air quality impact analysis
16 which was included in the application for
17 certification. That analysis demonstrates that
18 the project will not cause any new violations of
19 any state or federal air quality standards. And,
20 as a result, insure that there are no localized
21 air quality impacts.

22 The third element of the local analysis
23 was the performance of a screening level health
24 risk assessment; that's discussed both in the air
25 quality and public health sections of the

1 application. And that screening level health risk
2 analysis demonstrated that there would be no
3 significant health risk as a result of the
4 project.

5 Both the air quality impact analyses and
6 the health risk assessment were performed using
7 extremely conservative modeling assumptions.
8 Those assumptions included the assumption that
9 worst case emissions would occur, in fact actual
10 emissions from the project are expected to be much
11 lower than the maximum levels indicated both in
12 the application and in the permit.

13 We also assumed that there were worst
14 case meteorological conditions based on the use of
15 meteorological data sets approved by the San
16 Joaquin District and the CEC Staff.

17 The result was that we assumed this
18 combination of worst case impacts even if they
19 could not physically occur at the same time.

20 With respect to regional air quality
21 impacts we took a look at three principal areas,
22 as well. The first was the performance of --
23 again, the demonstration of the project would
24 not -- excuse me, let me start again -- was an
25 analysis of the project to make sure that it used

1 best available control technology because again,
2 when taking a look at regional or cumulative
3 impacts it's important to make sure the project
4 emissions initially are minimized.

5 Second aspect of the regional analysis
6 were a series of cumulative air quality impact
7 analyses. These included both a review of nearby
8 projects that might potentially contribute impacts
9 on the same general area as this project. And, as
10 well, looking at worst case existing background
11 air quality, which reflects the contribution of
12 all existing sources in the general region.

13 The conclusion from these cumulative air
14 quality impacts analyses were that once again the
15 project would not cause any new violations of any
16 state or federal air quality standards, but it
17 would contribute to existing violations of state
18 and federal standards for PM10 and ozone.

19 Finally, the analysis of regional
20 impacts used emission reduction credits to insure
21 that those cumulative impacts, the contributions
22 to the regional violations of ozone and PM10
23 standards, were addressed. The emission reduction
24 credit aspect of the program is one of the most
25 misunderstood aspects of the air pollution control

1 program. Emission reduction credits are not
2 intended to result in localized benefits. They
3 are, instead, intended to manage growth in
4 industrial sources while insuring that there's a
5 regional reduction in emissions overall.

6 And the analyses that we performed
7 indicated that the credits provided to satisfy the
8 District would insure that there's a regional
9 benefit, as well.

10 Q So before turning to the differences
11 with staff, I want to first briefly again
12 summarize your overall findings. Overall, what
13 were your findings with regard to significant
14 impacts?

15 A We concluded that with mitigation that
16 was proposed by the applicant that the project
17 would not result in any significant, unmitigated
18 air quality impacts or any significant unmitigated
19 cumulative air quality impacts.

20 Q And with regard to compliance with LORS,
21 laws, ordinances, regulations and standards, what
22 were your findings there?

23 A We concluded that the project would
24 comply with all LORS, looking at local, state and
25 federal air quality requirements.

1 Q Okay, now turning to the differences
2 with staff, can you, to the extent we have
3 disagreements with staff, can you summarize those
4 differences and whether they have any effect on,
5 in terms of the quality of mitigation or the
6 impacts, themselves?

7 A No, I don't believe that the remaining
8 disagreements that we have with the staff relate,
9 in any way, to my conclusions regarding the
10 significance of project impacts, or whether the
11 impacts have, in fact, been adequately mitigated.

12 Q Okay, so let's turn now to those areas
13 of disagreement, if we could. Could you briefly
14 summarize the area related to construction?

15 A Yes. In my testimony I discuss at
16 length disagreements between the applicant and
17 staff regarding construction mitigation
18 requirements. This is an area that I know is very
19 difficult for the Committee to deal with. It's a
20 very complicated and onerously detailed topic
21 area, which is why I spent as much time as I did
22 in my testimony discussing this.

23 I think fundamentally we still have a
24 problem with respect to the Commission Staff
25 attempting to duplicate requirements that have

1 been established by local air districts.

2 When this whole idea of mitigating
3 construction impacts first resulted in a
4 promulgation of additional conditions the staff
5 represented in hearings at that time, many years
6 ago, that the purpose was to fill a gap, because
7 most local air districts did not regulate
8 emissions during construction.

9 In many districts, and in particular in
10 the San Joaquin District, that's no longer the
11 case. And what we're having to do is to comply
12 with essentially two different sets of LORS
13 requirements.

14 Given how complicated this is, and given
15 the tremendous effort that the staff has put into
16 working with us over the last two weeks, as
17 evidenced in the addendum, which I believe is
18 exhibit 47, there are no longer any areas of
19 disagreement regarding the construction mitigation
20 conditions.

21 However, I still think it's an issue
22 that even if this Committee does not address, that
23 the Commission, as a whole, needs to address;
24 which is whether and to what extent Commission
25 Staff should be establishing additional LORS

1 requirements in areas where air districts already
2 regulate exactly the same source of emissions.

3 But, again, in summary, with the
4 revisions contained in exhibit 47, there is no
5 longer a disagreement between applicant and staff
6 regarding the construction mitigation requirements
7 for this project.

8 Q Okay, thank you. I just want to draw
9 your attention -- actually the Committee's
10 attention to there's two alternatives in your
11 testimony, is that correct, alternative one and
12 alternative two.

13 I guess alternative one is the testimony
14 that essentially says, you know, follow District
15 rule 8, is that correct?

16 A That's correct.

17 Q And then alternative two, as modified,
18 is the agreement we reached with staff on this
19 construction mitigation measures?

20 A That's correct.

21 Q Okay, thank you. Staff had also sought
22 approval of various documents related to some
23 District documents. And we've mentioned AQ47.
24 Can you summarize your testimony there for us,
25 please.'

1 A Yes. In exhibit 47 the staff has
2 largely agreed with us that they do not need
3 separate approval authority for numerous specific
4 documents that are required by the Air District to
5 demonstrate compliance with District requirements.

6 And the addendum makes modifications to
7 a number of conditions with the exception of AQ47
8 that we believe are acceptable and fully address
9 our concerns.

10 With respect to AQ47, we recommended one
11 final change; and I'm presenting this as
12 modifications to the language contained in the
13 addendum. The changes would only be with respect
14 to the verification for condition AQ47. And the
15 modifications would be twofold.

16 First, in the first sentence there's the
17 phrase, "Demonstrating compliance with this
18 condition to the CPM." We would insert the words
19 "for review". So that the first sentence now
20 reads, "Demonstrating compliance with this
21 condition to the CPM for review and APCO for
22 approval."

23 And then the second change to the
24 verification would be the addition of one sentence
25 immediately following the first sentence. And

1 that sentence would read, "Front-half
2 (noncondensable) and back-half (condensable)
3 particulate shall be measured and reported."

4 And just for clarity I'll read the
5 entire verification through as we propose that it
6 read:

7 "The project owner shall provide a source
8 test plan demonstrating compliance with this
9 condition to the CPM for review and APCO for
10 approval 15 days prior to testing. Front-
11 half (noncondensable) and back-half
12 (condensable) particulate shall be measured
13 and reported. In addition, the project owner
14 shall provide to the CPM evidence of the
15 District's approval of the source test plan
16 prior to conducting the source test."

17 Q Mr. Rubenstein, the last part of that
18 verification says the provision of evidence. Can
19 you explain your understanding of what that
20 evidence would be?

21 A Yes. That's language that the
22 Commission Staff proposed in the addendum in each
23 of the verification conditions where we've reached
24 this compromise.

25 When I first saw it I was a little

1 confused because it suggests to me that there will
2 be some written document that will come from the
3 District confirming that these various protocols
4 or monitoring systems have been approved.

5 In my experience the District does not
6 issue such written approvals. They only issue
7 documents indicating when they take exception to
8 these submittals.

9 Discussions with staff indicate that
10 this evidence need not be written; that it can be
11 oral. In my experience we typically don't even
12 get phone calls from the District. They simply
13 let us know when they object, and they're silent
14 otherwise.

15 We're relying on the staff's good faith
16 at this point, in the interest of reaching this
17 compromise, that if we get an affirmative silence,
18 if you will, from the District, we will figure out
19 some way to satisfy this requirement. If, in
20 fact, the staff in six months or a year decides
21 that they want some new document the District
22 currently doesn't issue, we may be back in a
23 compliance proceeding seeking amendment to the
24 verification language. But at this point we're
25 hopeful that that won't be necessary.

1 Q Thank you for that important
2 clarification.

3 Okay, those are, I guess, more or less
4 preliminary matters. Now there are, as we've
5 talked about, two really disputed areas. And I
6 want to begin with the first, ammonia slip.

7 Can you summarize your testimony there,
8 please?

9 A Yes. In the final staff assessment, and
10 this is not an issue that's been revised in the
11 addendum, staff has proposed a 5 ppm ammonia slip
12 limit for the project on a 24-hour average basis.
13 This language is contained in condition AQC6.

14 I have, in my testimony, explained why I
15 believe that --

16 (Telephone interruption.)

17 MR. RUBENSTEIN: I've explained why it
18 is that I believe that the 5 ppm slip is
19 unnecessary. In particular, in the past, the
20 staff has argued that a 5 ppm slip level should be
21 required. And they've argued it inconsistently,
22 in my opinion, sometimes in certain projects,
23 sometimes in others. But they've argued that it's
24 necessary to address potential for ammonia to
25 contribute to PM10 or PM2.5 formation in the air

1 quality region.

2 In the case of projects within the San
3 Joaquin Valley, the staff testimony in prior
4 proceedings that I've reviewed has consistently
5 indicated that the San Joaquin Valley is ammonia
6 rich. And by that I mean that the addition of
7 more ammonia does not, in fact, contribute to the
8 formation of additional particulate matter.

9 That has led to the staff's
10 recommending, as shown in table 2 of my testimony,
11 which is on page 9, that prior to this project in
12 every other proceeding the CEC Staff has agreed
13 with the San Joaquin District, and has proposed a
14 10 ppm slip level.

15 BY MR. HARRIS:

16 Q Mr. Rubenstein, I'm sorry to interrupt,
17 that's table 2 on page 9 of your testimony, is
18 that correct?

19 A That's correct.

20 Q One clarification, there's a table 2
21 there and there's also a table 2 on page 14. We
22 need a clarification, I just noticed this.

23 A You're right. The table that's on page
24 14 should be labeled table 3, not table 2.

25 Q So, going back to table 2 on page 9, can

1 you explain again what this table is and how you
2 compiled it for the Committee?

3 A Yes, I reviewed both the final staff
4 assessments and Commission decisions, and in a few
5 cases, the Presiding Member's Proposed Decisions
6 for every project that the Commission has licensed
7 since I believe it's 1999, both to ascertain what
8 the staff's position has been, the applicant's
9 position has been, and what the Commission's
10 ultimate decision has been regarding ammonia slip.

11 In compiling this there are some very
12 noticeable patterns that can be found. In
13 particular you'll find that in some air districts,
14 for example the South Coast Air District, the
15 ammonia slip level is consistently 5 parts per
16 million. In other districts, for example, prior
17 to this case, the San Joaquin Valley, the ammonia
18 slip level accepted both by the staff and by the
19 Air District has been 10 parts per million.

20 Q Mr. Rubenstein, you're looking at the
21 last cell, then, of table 2, is that correct?

22 A The last block is the San Joaquin Valley
23 Air Basin, and two blocks up is the South Coast
24 Air Basin.

25 Q Just so I understand, you've got two

1 columns at the end there. One's labeled FSA and
2 one's labeled decision?

3 A That's correct.

4 Q Can you again explain where those
5 numbers came from?

6 A Yes. Everything in the FSA column came
7 from the final staff assessment for that case.
8 Everything in the decision column came from the
9 Commission's decision on that case.

10 Q Thank you.

11 A In terms of the pattern it shows that
12 the determination as to whether an ammonia slip
13 level would be 5 or 10 parts per million is
14 largely a function of geographically where the
15 project's located in the state. And I think
16 that's appropriate.

17 There are very few districts in the
18 state that actually have the best available
19 control technology requirement for ammonia. The
20 South Coast Air Quality Management District is one
21 of them. The best available control technology
22 means that a limit is established based on whether
23 or not it is feasible to meet that limit, rather
24 than on whether there is a need from an air
25 quality perspective to achieve that level of

1 emission control.

2 In those areas where there is no BACT
3 requirement for ammonia, and the San Joaquin
4 District is one of those areas, a judgment is made
5 as to whether an ammonia slip level is required or
6 not, based on other factors. Essentially it's
7 treated as a corollary to the NOx control level.

8 And supplementing what Mr. Swaney said
9 earlier, there was a discussion of ammonia as a
10 corollary environmental impact that was included
11 in the best available control technology
12 assessment that the applicant provided to the Air
13 District, and which the Air District reviewed.
14 And that is contained in appendix 8.1(e) of the
15 application for certification, which is exhibit 1.

16 So in my judgment this issue of ammonia
17 slip has largely been dealt with as it should be.
18 In areas where there is an explicit best available
19 control technology requirement, such as for the
20 South Coast, the ammonia slip limit has been
21 established based on what is technically feasible.

22 In other areas, such as the San Joaquin
23 Valley, the judgment has been made based on
24 whether there is a need for additional ammonia
25 control.

1 And in every proceeding case prior to
2 this one that I reviewed, both the Air District
3 and the Commission Staff have agreed that there is
4 no need for more stringent ammonia controls for
5 plants at this time.

6 The staff's testimony in this case, in
7 the Walnut Energy Center proceeding, is, in my
8 opinion, totally in opposite to the staff's
9 testimony in other proceedings where the ammonia
10 slip issue has been addressed.

11 The only other thing that I need to
12 point out, and I do in my written testimony, is
13 that with the passage of time there has, in fact,
14 been more research done on the need for and
15 benefits of additional ammonia control in the San
16 Joaquin Valley.

17 In June of this year the San Joaquin Air
18 District adopted a major revision to its PM10 air
19 quality plan. And one of the issues that was
20 evaluated both by the San Joaquin Air District and
21 by the State Air Resources Board was this very
22 question, do we need to control ammonia emissions
23 in the San Joaquin Valley in order to further
24 reduce PM10 levels.

25 As a result of that study, or as part of

1 that study, the Air Resources Board did a
2 sensitivity analysis where using a computer
3 simulation model they simulated a reduction in
4 ammonia emissions of over 50 percent, 5-0 percent,
5 from all sources in the San Joaquin Valley to see
6 whether such a dramatic change would, in fact,
7 have any impact on PM10 levels.

8 And as reported in the PM10 plan, and as
9 summarized in my testimony, the results of that
10 analysis were, at best, inconclusive, and
11 generally indicated that there were no benefits
12 except for possibly a small benefit in the very
13 southern end of the San Joaquin Valley. No
14 benefits to a 50 percent reduction in ammonia
15 emissions.

16 The reason why that's important here is
17 because not surprisingly ammonia emissions in the
18 San Joaquin Valley are dominated by emissions from
19 agricultural and other livestock operations. And
20 when I say dominated, I mean that the numbers are
21 close to 95 to 98 percent are associated with
22 agricultural, livestock and composting activities.
23 Less than 2 to 3 percent are associated with
24 industrial activities.

25 And although that emissions inventory

1 that's included in the San Joaquin District plan
2 does not expressly include ammonia emissions from
3 SCR controlled devices, estimates that the Air
4 Resources Board has made on a very preliminary
5 basis indicate it's well under 10 percent of the
6 total.

7 Consequently the difference, in my
8 opinion, between a 10 ppm slip level and a 5 ppm
9 slip level on this project, or even on a
10 collection of projects that the Commission might
11 see, will have absolutely no perceptible benefit
12 in terms of PM10 reductions anywhere in the San
13 Joaquin Valley.

14 And consequently I think there is no air
15 quality reason for requiring a lower ammonia slip
16 level than the 10 ppm level. The 10 ppm level,
17 based on my experience and understanding, is
18 essentially a good practices limit. It's to make
19 sure that the SCR system is properly operated and
20 maintained.

21 That's why the level is lower than what
22 might be necessary just to make sure there are no
23 health effects. In the case of, for example,
24 biomass burning facilities that use ammonia for
25 NOx control, their ammonia slip levels may be 20

1 or 50 or 100 parts per million, because that is a
2 good management practices level reflecting
3 capabilities of that technology using those fuels
4 and those combustion systems.

5 In the case of gas turbines, 10 ppm has
6 been the standard good management practices level
7 for a number of years. And it's only been
8 decreased in areas that have specific BACT
9 requirements for ammonia, or where there's been
10 established a clear air quality need to have lower
11 ammonia levels. The San Joaquin Valley District
12 doesn't fall into either of those cases.

13 So for all of those reasons I think that
14 AQC6 should be deleted, leaving in place the 10
15 ppm ammonia slip level that the San Joaquin
16 District has included in the FDOC.

17 Q Thank you. That concludes your
18 testimony on the ammonia slip issue, correct?

19 A Yes, it does.

20 Q Let's turn now to the second contested
21 issue, the ERC issue. Could you please summarize
22 your testimony for the Committee.

23 A Yes. In AQC8, the CEC Staff has
24 proposed two additional conditions that would be
25 precedent before the Walnut Energy Center could

1 use two specifically identified ERC certificates.

2 This issue is, to my mind, particularly
3 ironic. In proceedings before this Commission
4 that I've participated in just a year or two ago,
5 when this issue was first raised, and it was
6 raised in part by the CEC Staff, reference was
7 made to pre-1990 emission reduction credits, or
8 pre-1990 ERCs.

9 As this issue was first evolving and we
10 were advising the Turlock Irrigation District on
11 what credits to be purchased, we indicated, and I
12 believe, that the San Joaquin District's technical
13 position and regulatory position is correct, which
14 is to say that these credits are valid.

15 However, I advised TID that if you want
16 to avoid an argument with the CEC Staff, you
17 should buy credits that were created after January
18 1, 1990, taking what I felt was a literal reading
19 of the phrase, pre-1990.

20 Since that time, and since these two
21 certificates were purchased, the EPA has made more
22 precise their definition of what they mean by pre-
23 1990, and what they mean by pre-1990 is
24 certificates that were created prior to November
25 15, 1990. You might almost call those pre-1991.

1 And the CEC Staff apparently has now
2 shifted its definition to that, although in my
3 opinion the CEC Staff and EPA are still not quite
4 in synch about what it is they're requiring.

5 In any event, these two certificates
6 were purchased with the intent of trying to avoid
7 this dispute; not because we believe that the
8 staff's technical objections or EPA's objections
9 are correct. But simply to avoid the issue
10 completely.

11 However, between the time these credits
12 were purchased and the hearing today, people's
13 definitions of that pre-1990 have changed to mean
14 something that obviously has got nothing to do
15 with pre-1990.

16 So that's the irony in the position.
17 I've reviewed this issue in the context of several
18 other projects in detail. I agree with the
19 District's judgment that they have been properly
20 addressing EPA requirements. And I make that
21 statement after having reviewed the EPA guidance
22 documents that Region IX has cited.

23 Fundamentally this is a dispute that has
24 been going on between the San Joaquin District and
25 EPA in one form or another for many many years.

1 Almost as long as this District has been in
2 existence, in fact. The District hasn't been
3 around for decades, otherwise it wouldn't have
4 been going on that long.

5 But in any event it literally goes back
6 to the formation of the District. If you take a
7 look at the simple question, for example, are
8 these ERCs contained in an air quality plan. The
9 answer is yes. And I didn't do it in this
10 proceeding because I didn't expect that we'd
11 necessarily have to get to this point.

12 But in testimony, for example, in the
13 San Joaquin Valley Energy Center, I specifically
14 identified the place in the air quality plans
15 adopted by the San Joaquin District which
16 specifically identified these ERC certificates.

17 EPA's response is, well, you didn't
18 identify them correctly. Not that they were mis-
19 identified, but somehow the format or the manner
20 of presentation or the way in which the numbers
21 were used was incorrect.

22 The problem that AQC8 presents
23 fundamentally is it interjects another agency into
24 this dispute, and it creates two additional
25 requirements. EPA does not require that rule 2201

1 be approved as revised prior to these credits
2 being accepted. They have never said that.

3 In fact, District rule 2201 is approved.
4 It's in the state implementation plan. The
5 paragraphs that are at dispute between EPA and the
6 District as in the approved state implementation
7 plan. And there are always rule changes that are
8 coming up, pending, and as part of the dispute
9 between EPA and the San Joaquin District, the San
10 Joaquin District keeps trying to refine rule 2001
11 to remove whatever it is that appears to offend
12 EPA.

13 At the same time, as all districts do,
14 they're trying to improve their rules and there
15 are other changes being made to rule 2201. It is
16 not clear to me when, if ever, rule 2201, in its
17 entirety, in its current form, will be approved by
18 EPA. Because there are always going to be some
19 revisions that are always going to be out of
20 synch.

21 Condition AQC8 simply says that EPA has
22 to approve rule 2201. If you want to take a
23 literal reading and say, well, the rule's approved
24 now and therefore we've satisfied that prong,
25 however I don't think that's what the staff's

1 intention is.

2 The second prong of condition AQC8 is a
3 requirement that the District has to include those
4 ERCs in an EPA-approved attainment plan. And
5 there are several problems there.

6 First of all, there are enormous hurdles
7 that an Air District has to address in order to
8 gain full EPA approval for an attainment plan.
9 How they address ERCs that were created or issued
10 prior to November 15, 1990 is actually one of the
11 smaller concerns that have to be addressed.

12 By placing into Commission requirements
13 language that says that before these certificates
14 can be issued they have to be listed in an EPA-
15 approved attainment plan is, in my opinion,
16 tantamount to saying you can't use these credits.
17 Because we could all be retired, I would hope we
18 would all be retired before EPA ever gets around
19 to finally and completely approving a PM10 or an
20 ozone air quality plan for the San Joaquin Valley.
21 It's going to be a very long time.

22 And as a result, if AQC8 is adopted
23 there is no doubt in my mind but that what TID is
24 going to have to do is they're going to have to go
25 onto the market, find a different set of credits,

1 go to the Air District, seek amendment for the
2 FDOC, come to this Commission and seek further
3 amendments, because otherwise there's just no
4 practical way they'll be able to commence
5 construction and begin operation with any
6 certainty based on these certificates.

7 And it's not because of the uncertainty
8 about the dispute between EPA and the Air
9 District. It has to do with the uncertainty
10 created by this condition, AQC8.

11 Mr. Valkosky, you'd asked earlier what
12 would happen to an applicant if this dispute
13 persisted and it was time to surrender the
14 certificates. What's happened in other cases that
15 I've been involved in is that EPA has taken a look
16 at the details of the specific certificates
17 involved, and decided that those specific
18 certificates are acceptable.

19 I don't know that the Committee wants to
20 go into this, I think Mr. Boyd's familiar with it,
21 but there are specific group of certificates that
22 were issued in the early 1980s that are ultimately
23 at the core of the dispute between EPA and the San
24 Joaquin District. And they deal with emissions
25 reductions from oil fields.

1 There may be technical concerns about
2 other certificates later on, but the real nub of
3 the problem is with the ERCs from the Kern County
4 oil fields that were issued in the early 1980s.
5 These certificates are not related to those
6 disputes.

7 And so if push came to shove and the
8 District and EPA were still arguing a year from
9 now, or 18 months from now, we would go to EPA.
10 We would present them with the detailed history of
11 these two certificates. And I fully expect that
12 EPA would say, okay, these two certificates are
13 fine. And they would say that without approval of
14 rule 2201. And they would say that without
15 necessarily having approved a District attainment
16 plan.

17 Now, I can see, and from what I'm
18 hearing myself say, that a suggestion might be,
19 well, let's modify AQC8 to say get a letter from
20 EPA. That would be darn near impossible. The
21 only thing that EPA would do if they approved
22 these certificates is they would agree not to
23 object to them.

24 And so I think fundamentally if there's
25 a problem that remains between the Air District

1 and the EPA, the applicant will have to address
2 it. And interjecting a third agency into that
3 dispute will simply complicate matters, I think,
4 to the point where you'd basically be saying that
5 we couldn't use these two certificates. And I
6 don't see that there's anything wrong with either
7 one of them.

8 That concludes my summary on that issue.

9 Q So then your conclusion is that AQC8
10 should be deleted, is that correct?

11 A Yes.

12 HEARING OFFICER VALKOSKY: So what
13 happens if a hypothetical that EPA did not approve
14 the certificates a year or 18 months from now?
15 Would you have to go out and get different ERCs,
16 or what?

17 MR. RUBENSTEIN: If that was the case,
18 EPA would signal that by sending a letter to the
19 applicant saying you should not -- and actually I
20 would expect EPA would send out the letter much
21 sooner than 18 months from now, they would say,
22 you should not proceed to construct this project
23 based on these certificates because we don't
24 believe they're valid.

25 And if, in fact, such a letter were

1 issued by EPA, TID would initially negotiate with
2 EPA, see if we can get approval for these two
3 certificates. If not, TID would have to go out
4 and buy other certificates, which would then
5 trigger a process of coming back to the Air
6 District and to the Commission to revise both
7 decisions.

8 HEARING OFFICER VALKOSKY: Okay, so in
9 that case it wouldn't matter if there was a
10 conflict in opinion between the District and EPA.
11 It would be EPA's determination as to the validity
12 of the certificates that would control at that
13 time?

14 MR. RUBENSTEIN: It's not so much that
15 EPA would control, because even if EPA were wrong,
16 then they could still issue a letter saying you
17 shouldn't begin construction. And that letter
18 would have such a chilling effect in terms of
19 ability to obtain financing for a project, for
20 example, that an applicant would really have no
21 choice but to deal with EPA.

22 And again there isn't any specific
23 regulation that we're talking about that these
24 credits violate. The alleged violation is of
25 interpretation of policy guidance documents.

1 HEARING OFFICER VALKOSKY: Today, in
2 your opinion, does TID currently own or have
3 options to purchase all the ERCs necessary for
4 this project?

5 MR. RUBENSTEIN: Yes.

6 HEARING OFFICER VALKOSKY: Any
7 questions?

8 PRESIDING MEMBER BOYD: No, I'm waiting
9 to hear staff testimony.

10 HEARING OFFICER VALKOSKY: Ms. Holmes,
11 cross-examination.

12 MS. HOLMES: With that introduction.

13 (Laughter.)

14 CROSS-EXAMINATION

15 BY MS. HOLMES:

16 Q Good morning, Mr. Rubenstein. I want to
17 ask you first a question relative to something
18 that you stated earlier this morning. I thought
19 when you were making your summary of your
20 testimony you stated that ammonia slip does not
21 contribute to secondary particulates. Did I
22 understand you correctly?

23 A I said that based on work that was done
24 in the San Joaquin PM10 plan I believe that
25 additional ammonia emissions do not contribute to

1 secondary PM10 formation in the San Joaquin
2 District.

3 Q Is the San Joaquin District different
4 from the Sacramento District?

5 A I'm not aware of any studies that
6 comprehensively looked at this issue in the
7 Sacramento District, and so I would presume that
8 there may be some contribution in the Sacramento
9 District, but the studies that were done in the
10 San Joaquin District appear to me to be pretty
11 strong in their conclusions.

12 Q Your testimony in the SMUD proceeding
13 was that there was contribution, that you hadn't
14 quantified it and you didn't know how much it was,
15 but that there was contribution, does that sound
16 consistent with your recollection? I have the
17 transcript if we want to look at it.

18 MR. HARRIS: I want to object on the
19 basis that it's outside the scope of his prefiled
20 testimony in this proceeding. I'm not prepared to
21 defend my witness on something that wasn't in his
22 prefiled testimony.

23 MS. HOLMES: I'm merely going to the
24 witness' credibility. He's testified to a
25 different -- he's testified in a different way in

1 a previous proceeding. It seems to me that that's
2 fair game for my questions.

3 HEARING OFFICER VALKOSKY: Proceed.

4 MS. HOLMES: Thank you.

5 HEARING OFFICER VALKOSKY: Objection
6 overruled.

7 BY MS. HOLMES:

8 Q Is that your recollection of your
9 testimony in the SMUD proceeding?

10 A Yes, it is.

11 Q And is it your testimony here today that
12 although the ammonia slip from the SMUD facility
13 had the potential to contribute to secondary
14 ammonia, the ammonia slip from this facility does
15 not?

16 A Yes, with the difference being that in
17 between those two sets of testimony I reviewed the
18 San Joaquin District's PM10 air quality plan and
19 saw sensitivity analyses that had been done. I
20 had not done that prior to my testimony in the
21 SMUD proceeding.

22 Q You're referring to the study that's
23 listed on page 8 of your testimony?

24 A That's correct.

25 Q And as I read the summary of that study

1 in your testimony, you refer to two days, is that
2 correct?

3 MR. HARRIS: Can you point us to a
4 paragraph, Caryn?

5 MS. HOLMES: January 5th and January
6 6th. That's the paragraph in quotations.

7 MR. RUBENSTEIN: Those are the two days
8 for which the simulation was performed.

9 BY MS. HOLMES:

10 Q And would those two days have a unique
11 set of meteorological characteristics and ambient
12 air quality characteristics?

13 A I'm not sure that's the case because
14 when simulation studies are performed for air
15 quality planning, the days are specifically
16 selected to be representative of days in which
17 violations occur. So I don't think that they're
18 necessarily unique.

19 Q Do you know that that was done with this
20 study?

21 A It's been done with every study that I'm
22 familiar with, but I don't specifically know about
23 this study.

24 Q Do you know whether or not there has
25 been any attempt to try to validate the results of

1 the study by looking at actual reductions and then
2 measuring actual ambient conditions?

3 A No, I'm not aware of anybody actually
4 reducing ammonia emissions by 50 percent
5 throughout the San Joaquin Valley to see whether
6 there would be any benefit.

7 Q Or some lesser amount, perhaps?

8 A I'm not sure that a lesser amount would
9 be something that would result in measurable
10 benefits. That's why sensitivity studies are
11 typically done with large reductions on the order
12 of 50 percent.

13 Q Has the EPA approved this PM10
14 attainment plan?

15 A No.

16 Q Earlier this morning you were talking
17 about the effect, if you will, of the geographic
18 location of the power plant. And if I understood
19 you correctly you were implying that the ammonia
20 slip level should be, in large part, dependent
21 upon the ambient air quality in the location of
22 the project. Is that a correct characterization
23 of your testimony?

24 A Not quite.

25 Q What other factors besides the ambient

1 air quality should be considered in setting the
2 ammonia slip level?

3 A Well, it would be all the
4 characteristics of a particular air basin, so that
5 would include the ambient air quality,
6 meteorology, and the mix of emission sources.

7 Q Thank you. On your table 2 you list a
8 number of recent power plant cases that were cited
9 or under review by the Energy Commission. I'd
10 like to ask you whether or not San Joaquin is
11 designated as a serious PM nonattainment area?
12 It's not a trick question.

13 A Subject to check I believe the answer is
14 yes.

15 Q What about Monterey Bay Unified Air
16 Pollution Control District?

17 A I don't believe that it is.

18 Q What about San Luis Obispo County Air
19 Pollution Control District?

20 A I don't believe that it is.

21 Q So would it be fair to say that two of
22 the three districts that have identified an
23 ammonia slip level of 5 parts per million actually
24 have cleaner air than the San Joaquin District
25 does?

1 A Yes, and as I said, those Districts --
2 I'd given the South Coast as an example, but those
3 districts say 5 ppm is the best available control
4 technology requirement.

5 In the case of San Luis Obispo it was
6 explicitly presented as a BACT requirement. And
7 in the case of the Monterey District it was more
8 indirect, but it was not based on air quality
9 need, it was based on technical feasibility. And
10 that was the distinction that I was trying to make
11 between the different districts.

12 Q Monterey Bay was based on technical
13 feasibility? Is there a dispute about the
14 feasibility of a 5 parts per million ammonia slip
15 level?

16 A Not that I'm aware of.

17 Q But Monterey does have cleaner air, as
18 does San Luis?

19 A Yes.

20 Q Is it feasible, in fact, to design a
21 plant to meet a 2 parts per million NOx limit and
22 a 5 parts per million ammonia slip limit?

23 A In my opinion, yes.

24 Q And, in fact, you supported that in the
25 Morro Bay proceeding, didn't you?

1 A I did.

2 Q Do you know whether or not the Energy
3 Commission has licensed any facilities with those
4 levels?

5 A I'm not certain but I believe Magnolia
6 and Malburg may have been licensed with those
7 levels.

8 Q And do you know what the proposed
9 decision for the Morro Bay facility recommends?

10 A Yes, it is shown in table 2 in my
11 testimony. It says 5 ppm.

12 Q On page 7 of your testimony in the
13 second paragraph under additional issues, you
14 state that in such a region nitrate formation will
15 most effectively be controlled by minimizing NOx
16 and SO2 emissions, do you see that?

17 A Yes, I do.

18 Q I believe you earlier testified that
19 it's feasible, in fact, to control both, to
20 respectively NOx to 2 parts per million and
21 ammonia slip to 5 parts per million?

22 A Right.

23 Q So the Commission doesn't have to pick
24 between those two numbers, do they, in order to
25 achieve NOx reductions?

1 A My testimony, my statement didn't relate
2 to making a choice in terms of technical
3 feasibility. If you want to reduce ambient PM10
4 concentrations and you're looking at whether you
5 would control NOx emissions or whether you're
6 controlling ammonia emissions, there's no question
7 in my mind in the San Joaquin Valley you would
8 control NOx emissions.

9 Q I'm sorry, could you repeat -- I lost
10 your train, there. Could you state that again?

11 A In the San Joaquin Valley if you were
12 trying to answer the question should I control
13 NOx, or should I control ammonia, then there's no
14 doubt in my mind but that you would answer I
15 should control NOx because you get so little
16 benefit, if any at all, from controlling ammonia.

17 Q Is anyone proposing that we have to pick
18 between the two? In other words, --

19 A No.

20 Q -- is that the question we're asking?

21 A You're right, you can control ammonia to
22 get zero benefit and you could control NOx to get
23 some benefit without having to make that choice.

24 Q Earlier you stated, if I understood you
25 correctly, that you believed that the 10 parts per

1 million ammonia slip level had been selected by
2 other districts and perhaps even this District,
3 and the notes that I wrote down because it was
4 necessary to make sure that the SCR is operating
5 properly.

6 Is it your testimony that the SCR won't
7 operate properly if you have an ammonia slip level
8 less than 10 parts per million?

9 A No.

10 Q On page 8 of your testimony you have a
11 brief discussion about the sources of the ammonia
12 emissions and you indicate that ammonia slip, I
13 think you said or perhaps it's ammonia from power
14 plants is less than 10 percent of the inventory.

15 A That's correct.

16 Q Isn't that true for every pollutant from
17 a power plant? For example, isn't NOx from power
18 plants less than 10 percent of the inventory in
19 San Joaquin?

20 A I'm not just talking about power plants
21 here. I'm talking about 10 percent from all
22 sources that use SCR. Most of the sources that
23 use SCR are not power plants.

24 Q My question still remains the same.
25 Isn't it true that 10 percent of the emissions,

1 for example, of NOx or SOx do not come from power
2 plants, they come from other sources?

3 A I think in general that's true.

4 Q Is the source of the ammonia relevant to
5 the question of whether or not it forms ammonia
6 slip -- excuse me, forms secondary particulate?

7 A If your question is is there a
8 difference between an ammonia molecule emitted
9 from a power plant and an ammonia molecule emitted
10 from some other source, the answer is no.

11 Q Right. I'm curious about the relevance
12 of this. And so I'll ask just one more question.
13 The percentage of ammonia of the total inventory
14 doesn't affect its potential to form secondary
15 particulate, does it?

16 A It does in that if there's a sensitivity
17 analysis that's been done which shows that a 50
18 percent reduction in ammonia emissions would have
19 little or no benefit in terms of improving PM10
20 air quality, then clearly eliminating all ammonia
21 emissions from all sources that use SCR would have
22 little or no benefit in improving PM10 air
23 quality. That's what my intention was in that
24 paragraph, and that's what I believe the relevance
25 is.

1 Q So your testimony is that if all ammonia
2 emission sources were removed from San Joaquin
3 Valley it wouldn't make any difference in terms of
4 secondary particulate formation?

5 A No, I said if all of the ammonia
6 emission sources from SCR sources were eliminated.
7 That's what I was referring to.

8 Q I'm puzzled, but I think I'm just going
9 to drop it at this point.

10 MS. HOLMES: Those are all my questions.

11 HEARING OFFICER VALKOSKY: Redirect?

12 MR. HARRIS: No more questions.

13 (Pause.)

14 HEARING OFFICER VALKOSKY: All right,
15 are there any other questions for Mr. Rubenstein?
16 Okay, seeing none, thank you, sir.

17 MR. HARRIS: I'd move my documents into
18 evidence at this point, Mr. Valkosky.

19 HEARING OFFICER VALKOSKY: Is there
20 objection?

21 MS. HOLMES: No objection.

22 HEARING OFFICER VALKOSKY: No objection,
23 the documents identified before as part of the air
24 quality testimony on behalf of applicant are
25 admitted.

1 Ms. Holmes.

2 MS. HOLMES: Thank you. Staff's witness
3 in the area of air quality is Mr. Will Walters.
4 He needs to be sworn.

5 Whereupon,

6 WILLIAM WALTERS

7 was called as a witness herein, and after first
8 having been duly sworn, was examined and testified
9 as follows:

10 DIRECT EXAMINATION

11 BY MS. HOLMES:

12 Q Thank you. Could you state your name
13 for the record, please.

14 A My name is William Walters.

15 Q And did you prepare the air quality
16 testimony that's contained in exhibit 11 and in
17 the addendum, exhibit 47?

18 A Yes, I did.

19 Q And was a statement of qualifications
20 included in exhibit 11 with your testimony?

21 A Yes, it was.

22 Q And do you have any corrections to your
23 testimony at this time? Would you like, for
24 example, to address the language in AQ47?

25 A Yes. We have reviewed the applicant's

1 counterproposal to our proposal to work out a
2 compromise on AQ47. We have agreed to their
3 counterproposal language.

4 Q Thank you. And with that correction are
5 the facts contained in your testimony true and
6 correct?

7 A Yes, they are.

8 Q And do the opinions contained in your
9 testimony represent your best professional
10 judgment?

11 A Yes, they do.

12 Q I would like you to provide a brief
13 summary of your testimony and then focus on the
14 two primary issues of contention, that being the
15 ammonia slip and the ERCs at this time.

16 HEARING OFFICER VALKOSKY: Ms. Holmes, I
17 don't mean to interrupt you, but since we're
18 mentioning condition AQ47, does staff also agree
19 with the considerations and the meaning of
20 evidence as contained in the verification and as
21 explained by Mr. Rubenstein?

22 MS. HOLMES: I was actually going to ask
23 Mr. Walters to explain that a little bit later
24 because it's an issue, I think, that's broader
25 than just that one condition.

1 HEARING OFFICER VALKOSKY: Okay, fine.

2 MS. HOLMES: We had some discussion on
3 that with the applicant. And I was going to ask
4 him --

5 HEARING OFFICER VALKOSKY: Great.

6 MS. HOLMES: -- to provide a
7 clarification.

8 HEARING OFFICER VALKOSKY: Proceed,
9 then. That'll be fine.

10 BY MS. HOLMES:

11 Q Your summary.

12 A Staff performed a third-party review of
13 the information provided by the applicant. And
14 the information provided by the District and the
15 PUC and FDOC. We provided at least a couple sets,
16 if not more, of data requests for air quality.

17 We spent a lot of time going over
18 construction impacts and construction modeling, to
19 the point of getting an agreement. And we sent in
20 a set of comments on the DOC, or the PDOC, prior
21 to the FDOC.

22 In doing the analysis we found that in
23 general the plant will comply with all LORS and
24 will not result in potential for significant
25 impacts. We found that in general the BACT, best

1 available control technology, that has been
2 proposed by the applicant is acceptable. And we
3 agree with the District's findings, again for the
4 most part.

5 And we have come to agreement on the
6 amount of ERCs that are required to mitigate the
7 project.

8 The remaining issues are the ammonia 5
9 ppm slip and two of the ERCs, whose EPA has
10 brought out as a concern, or has been brought out
11 as a concern on a few cases now in regards to the
12 pre-baseline ERCs.

13 In order to resolve those two issues we
14 looked at a number of cases. We looked at the
15 feasibility for ammonia reduction. We looked at
16 the air quality in the region, along with
17 meteorology and other factors. And we believe
18 that for this project a 5 ppm ammonia limit is
19 both feasible and warranted based on the poor
20 ambient air quality. The fact this is a serious
21 PM10 nonattainment area, the fact that the PM2.5
22 levels are as high as they are in the air basin.
23 And the fact that we don't necessarily agree that
24 the ammonia from this plant will not create any
25 increase in PM2.5 formation.

1 One of the issues that Mr. Rubenstein
2 has identified has been a simulation that was
3 performed by the District. That simulation is all
4 well and good, but there's no empirical data to
5 indicate that any further increase or further
6 reduction of ammonia wouldn't actually affect the
7 amount of ammonium salts formed in a much more
8 dramatic way than the simulation would predict.

9 And, in fact, using a corollary argument
10 you could say well, then why do you need an
11 ammonia slip at 10 ppm. It's because having
12 greater than a stoichiometric amount does help the
13 reaction. The reaction does go further because
14 there is more ammonia.

15 In looking at basic reaction equilibria,
16 for the most part if you have more reactants, in
17 general, even if you have more of a reactant that
18 is not a limiting reactant, the reaction will go
19 further to the other side of equilibrium. That's
20 what staff is concerned with.

21 And in reviewing other sensitivity
22 analysis we think that there will be the potential
23 for an increase in PM2.5, PM10 due to the
24 increased ammonia. We think that PM10 and PM2.5
25 is a very significant and serious issue in the air

1 basin. And that it is feasible to go down to a
2 2.5 ppm level to deal with this potential
3 significant impact. We think it's merited here in
4 this particular region.

5 Mr. Rubenstein has indicated that staff
6 has not treated this case similar to how it has
7 treated other cases, and uses his table 2 in his
8 testimony to indicate how we have not been
9 consistent.

10 Actually if you take a good look at
11 table 2 you'll find that we have actually been
12 very consistent that we have, in recent cases,
13 with one exception, for all large turbine projects
14 where we know we have quality or good deal ends,
15 we should get the NOx inlet to the SCR down to 9
16 to 15 ppm for guarantees, we have consistently
17 recommended 5 ppm.

18 Out of the last 12 projects we've made
19 that recommendation on 11. And the only time we
20 didn't make that recommendation was actually a
21 project I was working on, and that was because I
22 was trying to extend a compromise position in
23 order to get hopefully with agreeing to going up
24 to a higher ammonia limit that I might be able to
25 get some SO2 offsets that were not being proposed.

1 No SO2 offsets were being proposed for that
2 project.

3 Extending that particular olive branch
4 unfortunately didn't work unilaterally the way I'd
5 hoped it would. In fact, I was hit over the head
6 with the olive branch and --

7 (Laughter.)

8 MR. WALTERS: And now that 10 ppm is
9 coming back to haunt me in this particular case.

10 And, again, when you take a look at the
11 table you can see that you go from PSA dates all
12 the way from 1998 to 2003. And if you were to
13 chart the progression of what staff has required
14 you'll see that there's essentially a cutoff date,
15 and we have been very consistent with our 5 ppm
16 recommendation after that date, with that one
17 exception that I indicated.

18 One of the other things you need to do
19 in this table is identify that not all these
20 projects are equal. First, there's an error in
21 the table, well, actually three errors in the
22 table.

23 The table, itself, notes that these are
24 all combined cycle units. That's not true. Two
25 of the units are actually simple cycle units, the

1 Tracy plant and the Los Esteros plant. So, their
2 inclusion is erroneous.

3 There's one other plant that if you want
4 to split hairs is also not a combined cycle plant
5 because it does not produce electricity -- it's a
6 cogen plant. But maybe that's too fine a
7 distinction to worry about.

8 But staff's position has been, in the
9 various cases, that for these larger turbines it
10 is feasible and it's not cost prohibitive to go
11 down to a 2.5. And so any unique finding that Mr.
12 Rubenstein believes is the case here is not borne
13 out in the actual evidence or the actual looking
14 at what's going on with this particular table.

15 The other thing that should be pointed
16 out in this table is what is not here that can be
17 used as a nice reference in terms of how
18 regulations change or how thoughts on what
19 appropriate limits are would change.

20 If you were to take a look at the actual
21 NOx limits that were approved and/or recommended
22 by staff you would see again, as you went from the
23 older projects to the newer projects, all of a
24 sudden the projects were going from 2.5 to 2 ppm.
25 There is a normal progression as control

1 technology is found to be feasible and effective
2 at lower limits, that you require -- districts
3 require and we agree, that lower limits should be
4 sought and should be required for plants.

5 So, essentially going from 10 to 5 is
6 progress. And it is something that essentially
7 staff believes should be done across the board at
8 this point, just like going from 2.5 to 2.0 in NOx
9 is something that we now believe for these kind of
10 turbines that I've been discussing, the large 7
11 Frame type turbines, should be a BACT finding
12 across the board, regardless of the region or the
13 area in the State of California.

14 Mr. Rubenstein bases part of his
15 argument that the amount of ammonia from SCR is a
16 very small amount of the total amount of ammonia
17 from the region. And that may be true, but as
18 more and more projects come online and as
19 agriculture is eventually tried to be controlled
20 in terms of the efforts of the changes in the laws
21 that now allow agriculture to be controlled or
22 major sources to be controlled, that that
23 percentage is probably going to go up.

24 And any ammonia inventory that has been
25 produced certainly hasn't accounted for all the

1 increase and all the new power projects that are
2 in the basin. And regardless of the fact that
3 it's a small amount, that doesn't mean that there
4 won't be some contribution and that won't be
5 significant regionally from the project.

6 If you want to take a look at all
7 combustion sources within the region their NOx
8 emissions, their VOC emissions, their PM10
9 emissions are well less than 10 percent of the
10 total for the entire air basin.

11 However, they are regulated; they are
12 offset as appropriate. And they do have BACT
13 findings to make sure that new sources do not emit
14 more than control technology will allow.

15 And I guess in terms of my findings, in
16 terms of BACT, I look at BACT considering all the
17 different guidelines for how one should consider
18 BACT. The District has its particular set of
19 guidelines. It doesn't consider certain secondary
20 or corollary effects. That's part of their
21 guidelines. That's not, however, how EPA
22 guidelines for BACT recommend the BACT be
23 addressed.

24 And certain secondary effects of
25 technologies, whether it's effects to wastewater

1 or effects to other things, are noted they should
2 be addressed as part of the analysis of BACT,
3 whether or not the limits and requirements
4 couldn't be changed to address other effects of
5 the technology. In fact, those BACT guidelines
6 I'm referring to specifically refer to something
7 that's essentially identical to this, in terms of
8 the fact of substituting one pollutant for
9 another.

10 Their example is they use an afterburner
11 combustion technology to reduce VOC emissions,
12 whether it's from a painting source or whatever.
13 And essentially there, if you aren't careful,
14 you're just trading NOx for VOC. You don't get
15 the type of benefit you could if you were to take
16 a look at the technology more holistically and
17 say, well, okay, I can get a 99 percent reduction
18 if I want to have all this NOx. But I can get a
19 98 percent reduction and almost no NOx if I go to
20 a catalytic system.

21 And in the same way in doing a total
22 BACT analysis you should be looking at these
23 secondary effects and finding out whether or not
24 you can go to lower levels, whether it's
25 appropriate and whether it's feasible.

1 And one of the things that staff has to
2 deal with, and you can see on these tables, is the
3 fact that while we're trying to be consistent in
4 all our projects, the districts aren't. They're
5 not consistent in what they call BACT; they're not
6 consistent on how they integrate BACT.

7 And, as staff, we are trying to be more
8 consistent and trying to identify what we consider
9 to be a reasonable technology and reasonable
10 limits for these kind of similar large projects
11 throughout the State of California.

12 So that's most of my testimony on the
13 ammonia emissions.

14 In terms of the ERC emissions,
15 essentially all that staff is asking for is to
16 make sure that these credits are valid. Right now
17 there is a question of whether or not they're
18 valid. EPA has stated so in their comment letter
19 on the PDOC.

20 Staff has to make a recommendation to
21 the Committee based on the Public Resources Code.
22 The Public Resources Code is very clear that the
23 Committee is not supposed to approve a project if
24 it is not in compliance with federal law.

25 We are in a position where we're between

1 two agencies. We don't like to be there. We wish
2 this issue wasn't around. However, in order to be
3 in compliance with those requirements of the
4 Public Resources Code, specifically 25523 and
5 25525, we've made the recommendation that we have
6 to make sure that these ERCs do comply with
7 federal law.

8 Because at this point EPA is of the
9 position that without the new rule 2201 being
10 approved, or without these credits being provided
11 in the attainment plan, in the method that they
12 consider it necessary for them to be provided,
13 that these ERCs are not valid.

14 Mr. Rubenstein identifies that he thinks
15 that the fundamental problem is the fact that they
16 were a bunch of old credits where, essentially the
17 old oil patch down in Kern County, where the ERCs
18 were not calculated correctly.

19 Staff understands that problem and has
20 discussed that problem with EPA where essentially
21 they were ERCs that were created based, apparently
22 based on the potential to emit, rather than the
23 actual emissions. And certainly those would be
24 problematic, since you wouldn't have an actual
25 reduction if you were to use all those ERCs.

1 However, in our discussions with the EPA
2 that is a completely separate issue from the pre-
3 1990 pre-baseline, if you want to call it more
4 accurately, issue. They are completely separate
5 issues in terms of why they are having a problem
6 with those ERCs.

7 Essentially EPA has a problem with the
8 one set of ERCs because they don't think they were
9 properly accounted for in the first place, and
10 overstate the amount of actual emission
11 reductions.

12 That's not the issue in the second case.
13 In the second case they're saying that these
14 emissions haven't been accounted for in the
15 attainment plan and therefore using them would
16 essentially violate the numbers that provide the
17 attainment plan; you wouldn't be able to show
18 attainment by using these credits.

19 So all our condition is trying to do is
20 essentially making sure that they are complying
21 with the existing LORS, existing Clean Air Act,
22 and existing requirements of EPA. We're not
23 creating a new regulation. We're making sure that
24 the regulations that the District is proposing to
25 deal with this issue, the rule 201, as the new

1 accounting procedure. Or attainment plans, that
2 the District is obviously very late on, on the
3 sanction clocks, and happened on a number of
4 occasions.

5 One or the other, not and, one or the
6 other gets taken care of. And in terms of the
7 language of the condition we would be willing to
8 change the language to be more specific to deal
9 with the fact that all we're looking for is that
10 particular part of rule 2201 that deals with
11 accounting procedures be approved, if that's
12 essentially one of the problems they have.

13 And it certainly would be something if
14 the Commission were to propose that type of
15 language, or ask us to propose that kind of
16 language, we'd be quite amenable to do that.

17 But again our basic problem is we're
18 between two Districts, and in staff's opinion the
19 final arbiter of compliance with the Clean Air Act
20 rests with EPA, not with the District, not with
21 Mr. Rubenstein, not with TID, but with EPA.

22 If EPA has a problem we have to stand up
23 and listen to it. And we have to advise the
24 Committee that there's a potential problem with a
25 federal law and federal law compliance. And

1 that's what this condition is in there for.

2 Now, Mr. Rubenstein also talked about
3 the construction requirements, and I was hoping we
4 actually had come to full agreement and we
5 wouldn't have to discuss construction. But he
6 raised some issues that I thought the staff needed
7 to discuss.

8 First, or maybe the main issue is that
9 he considers the fact that we're raising new LORS
10 requirements. Our mitigation is not based on new
11 LORS, it's based on mitigating what would
12 otherwise be significant impacts. It's a CEQA
13 mitigation, not a new LORS. His characterization
14 in that regard is 100 percent off base.

15 What we were trying to do in the
16 condition is we're trying to match the amount of
17 mitigation that the applicant proposed in their
18 emission plan, in their modeling, to the amount of
19 mitigation that we are going to require them to
20 have.

21 That amount of mitigation includes
22 certain assumptions in the equipment which
23 District regulations do not cover. And assumes
24 certain very aggressive mitigation in the fugitive
25 dust that staff believes that the District rules

1 would not necessarily require.

2 BY MS. HOLMES:

3 Q Could I just interrupt you for one
4 second. You said you're trying to match the
5 mitigation with the mitigation. Did you mean you
6 were trying to match the applicant's emissions
7 estimates with the mitigation? Is that --

8 A Their emission estimates and the
9 mitigation they assumed to get to those emission
10 estimates.

11 I lost my train of thought.

12 Q Sorry.

13 (Laughter.)

14 MR. WALTERS: Well, so staff recognizes
15 the fact that many districts do have fugitive dust
16 measures. Those fugitive dust measures do not
17 always mean that staff will consider those
18 measures to be enough to mitigate significant
19 impacts.

20 Particularly in cases where we have
21 nearby residences that can be unduly affected by
22 the project site. In this particular case we have
23 a resident that's just a couple hundred meters
24 right along the primary wind, predominant wind
25 direction from the site. And that is one of the

1 considerations we used to determine the amount of
2 mitigation that's necessary and whether or not we
3 have significant impacts.

4 Unlike other agencies that routinely
5 deal with overrides and actually don't provide all
6 feasible mitigation, we try to provide enough
7 mitigation that we actually think that we won't
8 have a significant impact. But that does require
9 sometimes quite a bit of mitigation, and requires
10 us to make sure in our condition that we have
11 understandable requirements, not just for the
12 applicant, but also for the compliance.

13 And not just say, oh, you have to comply
14 with these rules, and then the compliance people
15 have to try to figure out what that means. Or
16 staff has to try to figure out what that means.
17 And the rules are going to change over time
18 anyways; in fact, they're proposed to be changed
19 by September of next year. We don't know exactly
20 what that means, but we do have language in there
21 that identifies that, you know, conflicts with the
22 rule, conflicts with true provisions for
23 mitigation of the rule.

24 The districts will take precedence when
25 there's a true conflict. But when there isn't a

1 conflict, you know, we would like the level of
2 mitigation to be the same as what was proposed in
3 the model.

4 And I think that wraps up my
5 construction analysis, and for the most part, my
6 testimony.

7 BY MS. HOLMES:

8 Q I have one quick question. Could you
9 please provide a clarification as to what staff is
10 looking for in various of the verifications for
11 air quality in which we've asked for evidence that
12 certain things have been approved by the District.

13 A Yeah, this particular issue came up
14 while we were trying to come to agreement with
15 this particular requirement.

16 In our review of past projects,
17 particularly those that have been licensed
18 recently, we identified that the CEC generally
19 only gets review of CEM and other types of plants,
20 but in cases like East Altamont, Cosumnes, and
21 Pico, three very recent decisions, the staff does
22 actually have some approval, if not complete
23 approval rights, some approval or at least
24 commenting right directly to the applicant
25 regarding their plans. And requiring changes to

1 the plans for source testing, specifically just
2 the source testing.

3 So, we originally had tried to work out
4 the source testing part because we really thought
5 that approval of source testing is important to
6 the CEC. We want to make sure that the power
7 plants are tested across the board so that we have
8 emissions that make sense and we can provide data
9 as requested to the Commission and to the Governor
10 in terms of emission levels that are routinely
11 asked. Make sure that those are consistent and we
12 feel comfortable with the numbers that we're
13 providing.

14 That being said, after review of the
15 District requirements, which are fairly explicit
16 in terms of the test requirements, both how to
17 test in terms of what's being tested, and when.
18 They're also fairly explicit in terms of the
19 source test methods. So we felt we could get rid
20 of the approval at least from the CEC's side, as
21 long as we were convinced the District had
22 approved all these plans.

23 I called the District to try to get
24 information on what they would and wouldn't
25 provide for these type of plants. And I found out

1 that they actually do provide an approval letter
2 for every source test plan. In fact, source tests
3 cannot be conducted without that approval, or at
4 least that's what I was told.

5 And they gave me a copy of one; in fact,
6 it was a copy for one of the source tests for TID,
7 which must be undergoing source testing either
8 shortly or was recently source tested. So that
9 kind of plan is provided.

10 It is generally just provided to the
11 source testing company, so it would just require
12 the applicant to tell the source test company to
13 forward that approval letter to CEC.

14 I talked further with the District, in
15 fact Mr. Swaney, and I suppose we could bring him
16 up if you wanted to ask him the question to deal
17 with this particular issue. I asked him if they
18 couldn't provide some other level of approval,
19 whether it's verbal or email or a simple letter
20 for the various plans that are required under
21 their District conditions.

22 His indication was that it wouldn't be a
23 problem; that really all they would look for would
24 be something in the cover letter of those plans
25 that when they submit them to remind the District

1 to provide that approval to the CEC.

2 So, I don't know if I got off base on
3 the answer, but essentially we believe that
4 getting the District approval should not be a
5 problem. And we would accept a verbal or a simple
6 email approval, as well as a regular letter.

7 HEARING OFFICER VALKOSKY: Now, just to
8 keep this unified for purposes of the record. Mr.
9 Rubenstein, does that explanation add any degree
10 of comfort to the concerns you voiced --

11 MR. RUBENSTEIN: No, because prior to my
12 testimony today I polled both TID, as well as the
13 Modesto Irrigation District, to see if I could get
14 a copy of any approval letter that either one of
15 them had, and neither one of them did. So, I'm
16 very curious to see the letter that Mr. Walters
17 has.

18 I do think, Mr. Valkosky, this is not an
19 issue the Committee needs to deal with. I think
20 we will figure out a way to work this out.

21 HEARING OFFICER VALKOSKY: No, again,
22 I'm just interested in any changes we'd have to
23 make to the verification. However, in deference
24 to Mr. Shaw sitting back there, if he gets it in
25 compliance I think he'd like an understanding of

1 what the expectations are.

2 MR. RUBENSTEIN: Well, Mr. Swaney is
3 here, and if Mr. Swaney promises that he will give
4 us whatever we need to get to the Energy
5 Commission, then I guess we'll make it work.

6 HEARING OFFICER VALKOSKY: Mr. Swaney,
7 would you like to come up and make a commitment?
8 Or dodge the bullet. Your choice.

9 MR. SWANEY: Yes, Mr. Walters and I did
10 discuss this issue last week. As Mr. Walters
11 stated, typically in the past our approval of
12 source test protocols has gone to the source
13 testing company only. They're the ones who submit
14 the test protocol.

15 But as Mr. Walters did say, I did agree
16 that we can provide any of our approvals to the
17 Energy Commission or anybody else that needs it.
18 All we would like is a reminder when those plans
19 are submitted to us that just a reminder that we
20 will be doing this, because it's not a normal part
21 of our business. But we definitely can do this.

22 HEARING OFFICER VALKOSKY: Okay, thank
23 you for that clarification.

24 MR. HARRIS: Can I ask for further
25 clarification?

1 HEARING OFFICER VALKOSKY: Sure.

2 MR. HARRIS: Is the Air District then
3 seeing the CEC as a part of the approval loop
4 here, then?

5 MR. SWANEY: No.

6 MR. HARRIS: Okay, so it's just simply a
7 notification?

8 MR. SWANEY: It's a notification that we
9 have reviewed the submittals and have approved
10 them.

11 HEARING OFFICER VALKOSKY: I think it's
12 clear it's just a verification. Certainly that's
13 the way I'm interpreting it. Okay, thank you,
14 sir.

15 MR. HARRIS: One more question.

16 HEARING OFFICER VALKOSKY: Okay.

17 MR. HARRIS: Can we get a copy of this
18 letter that Will referenced in his testimony? Is
19 that -- what are we talking about?

20 MS. HOLMES: I didn't bring a copy down
21 with me. I mean, I'd be happy to give you
22 whatever he got a copy of. I don't think it's a
23 secret document.

24 HEARING OFFICER VALKOSKY: Well,
25 maybe --

1 MR. WALTERS: I could email a copy --

2 MR. HARRIS: It's secret to me.

3 MR. WALTERS: I could email a copy to
4 anybody who wants it. I got it emailed directly
5 from the District.

6 MR. SWANEY: Yeah, my understanding is
7 that it was a copy of the approval for the TID
8 Walnut Peaker testing that occurred earlier this
9 year.

10 MR. HARRIS: I'm sorry, you lost me.
11 Say again, a copy of a letter about a prior
12 approval?

13 MR. SWANEY: Yes. It was -- the person
14 who was asked at our District didn't quite
15 understand what Mr. Walters was asking about. And
16 so I provided a copy of a previous approval for a
17 test that TID had done earlier this year.

18 MR. HARRIS: I think Mr. Baysinger would
19 like a copy of the letter, too.

20 (Laughter.)

21 MR. HARRIS: I'm serious. To our
22 knowledge we've never received a copy of this
23 letter, either, for the --

24 MR. SWANEY: Right, and --

25 MR. HARRIS: -- Walnut -- this is not

1 Walnut, this is Almond; it's the other nut, so.

2 HEARING OFFICER VALKOSKY: Mr. Walters
3 has indicated he'll provide copies, so --

4 MR. WALTERS: And I think maybe we need
5 to say it again. Generally these letters go to
6 the source testing firm, which means the source
7 testing firm is apparently not providing you
8 copies of the approval letter. But obviously you
9 can make them do that. Or you can just ask the
10 District to send another copy.

11 MR. HARRIS: So -- I'll save it for
12 cross.

13 HEARING OFFICER VALKOSKY: Yeah, I think
14 that's all, that's clarified. Thank you, Mr.
15 Swaney, appreciate the clarification.

16 Further direct? Mr. Walters, before we
17 move on to cross, I'd just like you to help me
18 understand certain things.

19 First, regarding the ammonia slip limit.
20 While you indicate that staff has been
21 consistently recommending 5 ppm, is table 2 in
22 applicant's testimony correct in indicating that
23 the Commission has not been approving 5 ppm, but
24 rather has been approving 10 ppm in those cases?

25 MR. WALTERS: Actually, it's a bit of a

1 mixed bag in terms of the cases. Essentially
2 where the district has required the 5 ppm or also
3 in the case of Palomar, where I believe there was
4 quite a bit of intervenor action, 5 ppm was
5 eventually agreed to.

6 Although in the Palomar case the 5 ppm
7 isn't just a straight 5 ppm. It allows certain
8 excursions. I don't know the exact issue with
9 those excursions, but it generally requires a 5
10 ppm, I think, under normal baseload operation.

11 So, and again, you know, this table goes
12 over a very long period of time. If we were set
13 up with a table that had maybe just 2001 to the
14 present, or 2002 to the present, I think the data
15 would be a little more clear.

16 HEARING OFFICER VALKOSKY: Okay, well,
17 at San Joaquin Valley Air Basin starting with '01,
18 for example, Midway Sunset, Woodland, Sunrise --

19 MR. WALTERS: Well, for San --

20 HEARING OFFICER VALKOSKY: -- I mean did
21 you have any disagreement with it? That's all I'm
22 saying. As to the accuracy of what's reflected
23 here?

24 MR. WALTERS: Oh, the actual numbers
25 that are in the PPM columns for --

1 HEARING OFFICER VALKOSKY: That's
2 correct.

3 MR. WALTERS: Right. No, I don't
4 have -- I don't believe I have any issues with
5 that, as they're presented.

6 HEARING OFFICER VALKOSKY: Yeah. No, I
7 understand. Now, in order to adopt condition AQC6
8 as proposed by staff, I take it it would also be
9 necessary then to delete condition AQ31 from the
10 final DOC, which appears on page 4.1-69?
11 Basically what that says is that, well, shall not
12 exceed. Would you recommend that condition be
13 deleted or not?

14 MR. WALTERS: We generally keep the
15 District's conditions in even when we have
16 additional conditions beyond those conditions.

17 For example, we routinely ask for, or
18 maybe not routinely, but on occasion, if
19 necessary, ask for additional ERCs than what the
20 District asking. We don't delete the District's
21 condition that says, you know, that specifies the
22 amount of ERCs. We provide our condition that
23 requires more ERCs.

24 And in the same way we are requiring
25 just a lower ammonia limit. And that --

1 HEARING OFFICER VALKOSKY: Okay, so --

2 MR. WALTERS: -- compliance with our
3 condition would obviously be compliance with
4 theirs.

5 HEARING OFFICER VALKOSKY: So that
6 condition could remain, then?

7 MR. WALTERS: Right, it could remain or
8 it could be deleted.

9 HEARING OFFICER VALKOSKY: Yeah. What
10 is the legal limitation of the ammonia slip to
11 remain in '02 to be in compliance with District
12 rules? Is it a 10 ppm or a 5 ppm?

13 MR. WALTERS: The legal requirement?

14 HEARING OFFICER VALKOSKY: Yeah.

15 MR. WALTERS: Under District rules?

16 HEARING OFFICER VALKOSKY: Yeah.

17 MR. WALTERS: I don't believe there is a
18 legal requirement under District rules.

19 HEARING OFFICER VALKOSKY: Well, okay,
20 the legal requirement in terms of the FDOC; that's
21 10 ppm, is that correct?

22 MR. WALTERS: Yes, the FDOC states 10
23 ppm.

24 HEARING OFFICER VALKOSKY: So that would
25 be a legal requirement, then, is that correct?

1 MR. WALTERS: Correct.

2 HEARING OFFICER VALKOSKY: Turning to
3 the ERCs, and I'm happy to hear that staff is
4 willing to possibly work on some alternate
5 language regarding verification of the ERCs, but
6 just so it seems to me to indicate that there is
7 an alternative way to insure validity.

8 The basic question I've got, though, is
9 could the project proceed without EPA concluding
10 that the ERCs in question are in fact valid?

11 MR. WALTERS: I believe that would be
12 completely up to TID. The new source review
13 program has been delegated. So essentially I
14 believe they could.

15 So any assurance that TID would agree to
16 do whatever EPA wanted in the future is, you know,
17 it's their decision and speculative.

18 HEARING OFFICER VALKOSKY: Do you agree
19 with Mr. Rubenstein when he seemed to indicate
20 that probably applicant would probably be unable
21 to get project financing were EPA to cast a cloud
22 over the validity of the ERCs?

23 MR. RUBENSTEIN: I don't have any way of
24 identifying the project financing. It's a muni; I
25 would assume its financing is a little bit easier

1 than what say Calpine is having to endure right
2 now to try to get financing.

3 HEARING OFFICER VALKOSKY: Okay. Cross,
4 Mr. Harris? Thank you.

5 MR. HARRIS: Yeah, I'll let the
6 financing issue go. The answer is no.

7 (Laughter.)

8 MR. HARRIS: I said I was going to let
9 it go and then I couldn't resist, I guess --

10 MS. HOLMES: Just as long as you don't
11 cite that.

12 MR. HARRIS: Yeah, we might later. I
13 may jump around a little just because I took notes
14 on my computer and I have documents and other
15 stuff, so bear with me if I bounce around a bit.

16 CROSS-EXAMINATION

17 BY MR. HARRIS:

18 Q I guess the category is ammonia. We'll
19 start with the first question. You talked about
20 some equilibrium equation in your direct
21 testimony. Where is that discussion of the
22 equilibrium equation in your testimony?

23 A There is no discussion of equilibrium.

24 Q Okay.

25 A In my testimony, per se.

1 Q Okay, thank --

2 A But there is a discussion of reactions.

3 Q -- thank you. We've already touched on
4 this a little bit. On table 2 you said the
5 staff's been very consistent. Isn't it correct,
6 though, that the staff and the Commission
7 decisions are two different things? That there's
8 been some inconsistency there, is that correct?

9 A Yes, there have, but --

10 Q Has there --

11 A -- you know, I still put forth my staff
12 recommendation irregardless of the Commission
13 finding on various projects. You know, we have to
14 do our third-party review, and it has to be
15 something we think is a reasonable requirement.

16 Q You talked about working on, I think
17 what you said, 11 different cases on this issue,
18 ammonia, is that right? Did I hear you correctly?

19 A No, I said that staff, of the last 12
20 cases that staff had worked on, 11 of those cases
21 had --

22 A Thank you. I'm sorry, and --

23 A -- 11 of those cases were proposed --

24 Q I keep -- I should let you answer. I
25 apologize, Mr. Walters, I should let you answer.

1 I apologize.

2 A -- 11 of those last 12 cases, in terms
3 of the FSA dates, 11 of the last 12 for the large
4 turbine projects, the 7 Frame turbine projects,
5 staff recommended a 5 ppm for ammonia.

6 Q Could you list those 12 projects for me,
7 please? If it's easier, use table 2 of Mr
8 Rubenstein's testimony to refresh your memory.

9 A Man, I wish I could have brought my
10 computer because it's all there. Okay, Walnut
11 Energy Center; San Joaquin Valley Energy Center,
12 and it's the one of the 12 where we proposed a 10
13 in the FSA. I'm pretty sure we proposed a 5 in
14 the PSA, and then changed it with that olive
15 branch that didn't work.

16 Tesla; East Altamont; Russell City;
17 Malburg; Inland Empire; El Segundo; Magnolia; and
18 Mountainview, I believe all -- Mountainview may be
19 too old, be the bottom four in the South Coast Air
20 Basin. Palomar; Cosumnes; and if somebody's kept
21 track of the number --

22 MS. HOLMES: I think I missed one, I
23 have ten. Did you get Morro Bay?

24 MR. WALTERS: Oh, okay, Morro Bay. And
25 perhaps, based on the timing, Metcalf.

1 Unfortunately it's very hard for me to figure
2 these things out, I mean really because they
3 weren't presented in a time sequence.

4 BY MR. HARRIS:

5 Q Okay, thank you. You mentioned that at
6 one time you extended an olive branch. Can you
7 refresh my memory what you said there? The olive
8 branch was that you agreed to 10, is that correct?

9 A What we were trying to do is essentially
10 lower our requirements for ammonia in order to try
11 to get some SO2 ERCs. And, in fact, in the
12 testimony we were saying that we were doing that,
13 because we believed the SO2 ERCs were more
14 important for that particular case, because it was
15 a much larger project than this, and had much
16 higher SO2 emissions.

17 And essentially it was trying to come up
18 with a way of number one, reducing the number of
19 contentious issues on the case, which were rather
20 significant; and, again, trying to come to at
21 least some agreement on the SO2 issue which we
22 considered to be a very important issue.

23 Q So on this case where you extended the
24 olive branch and they stuck it back in your eye,
25 was it technically feasible to get 5 ppm on that

1 power plant?

2 A Yes, it was. And as I noted, I wouldn't
3 put that olive branch out again.

4 Q So it was technically feasible. But for
5 nontechnical reasons you decided to offer up 10,
6 is that correct?

7 A Right. And, again, as I indicated, I
8 believe that was a mistake on my part and I
9 wouldn't do it again.

10 Q How do you make a decision like that
11 about what you're going to extend in terms of an
12 olive branch? Let me be more specific in the
13 question.

14 Despite technical feasibility, put that
15 aside, you said 5 was technically feasible, what
16 criteria do you use to determine whether you're
17 willing to move your recommendation from 5 to 10?

18 A Well, in that case, we were obviously a
19 lot earlier in the timeframe, and the consistency
20 of the 5 ppm wasn't -- and staff's position wasn't
21 as firmly entrenched as it is right now, in terms
22 of what we want to do for ammonia slip.

23 We've had a lot of discussions since
24 that time on what we consider reasonable for
25 different turbines. And which post-date that

1 decision, number one.

2 So, if that discussion between the air
3 quality staff had been done prior to San Joaquin I
4 probably would not have made that decision.

5 Number two, that there are a number of
6 pressures on staff when there are disagreements
7 that we try to work off, and try to make as much
8 as we can, as many agreements as we can prior to
9 going into evidentiary hearings. As we did in
10 this case, we worked very hard to try to come to
11 agreements on construction and all of our
12 verifications of the District conditions.

13 Q So in making a decision about what
14 you're going to trade off, PM or ammonia, for
15 another thing, earlier in the case you're more
16 likely to trade off than later, is that what you
17 said? Did I mischaracterize that?

18 A No, what I'm saying is San Joaquin
19 occurred quite awhile ago. And it's timelined
20 with staff's current understanding of what we want
21 to do for ammonia was not fully formed. And we
22 didn't have a specific idea that we had worked out
23 between myself and with the seniors and with the
24 other air quality staff what we considered
25 reasonable ammonia limits.

1 Q Are you looking then at ammonia in the 5
2 ppm as a BACT issue?

3 A I think it's partially a BACT issue. As
4 I described, BACT should consider secondary
5 effects of a technology.

6 Now the District only deals with the air
7 toxic sector effect. And through their testimony
8 you can -- they obviously said they don't deal
9 with the secondary particulate effect.

10 However, in my assessment I did deal
11 with the secondary particulate effect and that's
12 why I have a finding of 5 ppm.

13 Q So if you pick it up and look at it as a
14 BACT issue you're mostly looking at feasibility,
15 then, isn't that right? It's feasible so it
16 should be required, is that correct?

17 A Well, it's partially because it's
18 feasible. But, again, the BACT issue I'm
19 identifying is from secondary environmental
20 effect. So the rationale for requiring it in the
21 first place, because we think that there's a
22 negative effect in having a higher ammonia limit.

23 MS. HOLMES: Perhaps I could just
24 interject, and I'm sorry to interrupt you, but I
25 think that we may be talking about two different

1 BACT issues. I believe that you're talking about
2 BACT for PM10 and he's talking about BACT for NOx.
3 You're talking about BACT for NOx?

4 MR. HARRIS: No, that wasn't my
5 question.

6 MS. HOLMES: Well, when you talked about
7 it as a BACT issue, it's a BACT issue from which
8 pollutant? Which pollutant are you talking about?

9 MR. HARRIS: No, it was analogous. Are
10 you looking at it as if it's a BACT issue.

11 MS. HOLMES: Ammonia as a BACT issue --

12 MR. HARRIS: Ammonia slip as a BACT
13 issue, are you --

14 MS. HOLMES: Ammonia as a pollutant for
15 which BACT should be required, or -- I'm trying to
16 understand. Because --

17 MR. HARRIS: Let me try again, then.

18 MS. HOLMES: Okay.

19 BY MR. HARRIS:

20 Q My understanding is that BACT involves
21 technical feasibility, is that -- that's correct?
22 I want to ask if it's correct.

23 So my question was are you looking at
24 this ammonia slip, the 10 ppm, whatever you're
25 going, as a feasibility issue?

1 A Well, partly we're looking at
2 feasibility issue because if we didn't think it
3 was feasible we wouldn't be recommending it.

4 Q So because it's feasible that's why
5 you're recommending it, is that correct?

6 A No, --

7 MS. HOLMES: That's an argumentative
8 question. It wasn't his testimony.

9 MR. HARRIS: I'd like a ruling on the --

10 HEARING OFFICER VALKOSKY: Just rephrase
11 it, rephrase the question. Proceed.

12 MR. HARRIS: I have to think
13 argumentative, and then translate, sorry.

14 BY MR. HARRIS:

15 Q Is it the staff's position that because
16 5 ppm is technically feasible it should be
17 implemented?

18 A It's staff's position that because
19 ammonia will contribute to PM10 that we should
20 lower the ammonia emissions appropriate with the
21 design of the plant. So that in part our
22 recommendation realizes a certain level of
23 feasibility.

24 However, we could recommend, if we were
25 to follow cases on the east coast, a 2 ppm NOx and

1 a 2 ppm ammonia.

2 Q Why aren't you requiring 2 now?

3 A Basically I don't think it's been
4 completely demonstrated.

5 Q Where has 2 ppm NOx and 5 ppm ammonia
6 been demonstrated?

7 A I don't know cases right off the top of
8 my head, but I believe everybody here has said
9 it's technically feasible.

10 HEARING OFFICER VALKOSKY: Let's forget
11 about the 2 ppm. It's certainly not relevant to
12 these proceedings.

13 BY MR. HARRIS:

14 Q With this staff's position that you're
15 recommending, will you be recommending 5 ppm slip
16 for all F class projects in the future throughout
17 California?

18 A I think it's staff's position right now
19 that for combined cycle projects, nonpeaking
20 projects, we've only had one class 7 peaker that I
21 think that we've actually licensed, or excuse me,
22 one peaker, but I believe that our current idea on
23 how we're going to deal with ammonia is yes, that
24 we are going to try to propose 5 ppm ammonia on
25 all class 7 type projects.

1 Q Your testimony cites CARB's suggestion
2 that air districts consider 5 ppm ammonia slip, is
3 that correct?

4 A Yes.

5 Q First, CARB asks districts to consider
6 those things, but it's not a CARB mandate, isn't
7 that correct?

8 A Well, I don't have it in front of me,
9 but I believe that's correct.

10 Q And isn't it also true that CARB asked
11 the air districts to consider a 5 ppm slip in
12 combination with a 2.5 ppm NOx limitation, isn't
13 that correct.

14 A Yes, that's correct.

15 Q Isn't it also true that the Air District
16 considered CARB's authority and rejected it in
17 favor of a 10 ppm slip?

18 A I'm not sure that there's anything in
19 the DOC language that says they rejected CARB's
20 recommendation or used, or even though in terms of
21 CARB's recommendation.

22 Q Well, actually I don't think I was being
23 that specific as the DOC language, just in general
24 terms. Isn't it true that the District considered
25 CARB's recommendation and rejected it in favor of

1 the 10 ppm slip level?

2 A Well, I can only go based on the
3 documents I've seen. What was in the mind of the
4 District is something you'll have to -- you'd have
5 to ask Mr. Swaney.

6 Q Is there any authority that you're aware
7 of for the CEC Staff to overrule the District in
8 its consideration of a CARB suggestion?

9 MS. HOLMES: Are you asking for a legal
10 conclusion?

11 MR. HARRIS: It's a LORS analysis. Is
12 he aware of any --

13 MS. HOLMES: No, he's provided testimony
14 as to whether or not the project complies with
15 LORS.

16 HEARING OFFICER VALKOSKY: I think this
17 is within the parameters of the witness'
18 testimony. Just answer the question, please.

19 MR. WALTERS: Could you restate it,
20 please?

21 MR. HARRIS: Perhaps.

22 BY MR. HARRIS:

23 Q Is there any authority for the CEC Staff
24 to overrule the District's consideration of CARB's
25 suggestion?

1 A I'll have to think about that one a
2 little bit, it's a fairly complicated question
3 considering the fact that we have to deal with LOS
4 and we have to deal with our CEQA requirements,
5 that the District is not responsible for, for this
6 particular project.

7 So, anything that we are asking for
8 above and beyond the District, I think would
9 generally be considered -- well, if it weren't
10 LORS documentation, which I think AQC8 is, for
11 example, I think it's more of a CEQA requirement
12 on our end to mitigate potential significant
13 impact.

14 So it's not -- we're not overriding a
15 LORS as much as dealing with our CEQA issue.

16 Q Did you just say that AQC8 is
17 documenting LORS? Is that your view of that
18 condition?

19 A It's documenting compliance with the
20 federal Clean Air Act. That's the intent of the
21 condition.

22 Q Give me a moment to look at the wording
23 of the condition.

24 (Pause.)

25 //

1 BY MR. HARRIS:

2 Q So I guess since we're there, on 8,
3 you're saying then that the two requirements you
4 have in 8, we've moved to ERCs now, I guess, well,
5 sorry -- that those two conditions are applicable
6 LORS then?

7 A Those are documentation of the federal
8 acceptance of the applicable LORS.

9 Q So let me ask the question again. Are
10 you saying that those are LORS, then; that there's
11 -- let me find the language of the condition. It
12 will be easier. Hold on, please.

13 (Pause.)

14 BY MR. HARRIS:

15 Q Okay, AQC8 says that project owner shall
16 only use ER certificates as 1834-2 and C492-4 to
17 offset the project if EPA provides final approval
18 of District rule 2001.

19 So is it your testimony that EPA
20 approval of District rule 2001 is an applicable
21 LORS?

22 A As I noted, we could specify that
23 condition a little more closely to the approval of
24 the accounting procedures in the currently
25 approved District rule -- it's 2201, by the way --

1 Q Excuse me.

2 A -- that federal approval then basically
3 identifies at the federal that they are in
4 agreement with that accounting procedure, which
5 they are going to use to show equivalency of their
6 offset requirements with the federal Clean Air Act
7 requirements for offsetting.

8 Q Okay, so accepting, for the purposes of
9 argument here, that we accepted some language
10 similar to what you just said about this
11 accounting mechanism, is that an applicable LORS?

12 MS. HOLMES: Is which an applicable
13 LORS?

14 BY MR. HARRIS:

15 Q Is the accounting mechanism in the
16 hypothetical language that Mr. Walters posed. He
17 said it wasn't the whole rule, it's this narrow
18 little accounting version.

19 Is that accounting mechanism, is that an
20 applicable LORS?

21 A Well, it's part of the rule, so since
22 it's part of the rule I would have to say yes,
23 it's part of the LORS.

24 Q Part of the approved rule, or part of
25 the rule that's pending?

1 A Part of the rule that's pending, which
2 is part of the LORS that this particular project
3 is going to use to show compliance with its ERC
4 requirements.

5 Because if we were to use the old rule
6 2201 I would not be able to accept these credits;
7 and only extending to the current rule 2201,
8 regardless of which version of the rule the FDOC
9 is based on, would I allow the credits.

10 So we're already jumping ahead to allow
11 the current rule 2201, rather than the older
12 version, which may be contained in the SIP.

13 Q Okay, so even though the old version of
14 2201 is in the SIP, you would find it unreliable
15 to rely on that approved rule?

16 A Basically EPA has identified that the
17 offset procedures for the prebaseline have not
18 been covered, and EPA is looking at two potential
19 remedies. That's what this condition is dealing
20 with, those two remedies. One of which is
21 contained in rule 2201. And one of which would be
22 attainment plans.

23 I think it's also important to specify
24 that we're looking for an "or" requirement, not an
25 "and" requirement here. So if the District rule

1 2201 is approved in December, which is the
2 statutory requirement for EPA to do a final
3 approval/disapproval on the rule, then the issue
4 goes away.

5 Q Okay, in your testimony you indicated
6 that you believe that those ERCs, can we just
7 refer to the owner for the numbers each time,
8 other than this time, it's S1834-2 and C492-4, you
9 testimony indicated that those are not valid, is
10 that correct?

11 A I think my testimony is that I think
12 there's a question of their validity, that they
13 cannot be identified as valid under EPA's
14 requirements right now.

15 Q So, you're saying then the EPA considers
16 those not to be valid, is that correct?

17 A I'm saying EPA does not consider them to
18 be valid, not that they consider them not to be
19 valid.

20 Q Do you have -- wait a minute, maybe we
21 better think about that. Can you restate that,
22 I'm sorry?

23 A I'm saying that EPA is not considering
24 them to be valid as opposed to considering them at
25 this time to be invalid. As I've indicated in my

1 testimony, we're in a middle ground in this
2 regulatory structure in trying to come up with
3 this agreement between the District and EPA.

4 So EPA's position at this point is
5 they're not going to call it invalid right now
6 until they get the rulemaking process done.

7 Q So there's --

8 A But they're not going to call them
9 valid, either.

10 Q -- there's a substantive distinction
11 then between invalid and not valid in your mind,
12 then? Is that your testimony?

13 A There's a -- I'm identifying it how EPA
14 has characterized it to me.

15 Q Let's turn to EPA's words, themselves.
16 Do you have exhibit 40 available to you? That's
17 the letter -- I'm sorry, exhibit 36. That's the
18 letter to the District from EPA, from Mr. Rios.

19 A Yeah, I have a copy.

20 Q Where in the letter does EPA say that
21 the two certificates are not valid?

22 A I don't think I've testified that EPA
23 has said they're not valid.

24 Q Well, they said they're invalid in this
25 letter?

1 A No, but they don't say they're valid,
2 either, in this letter.

3 Q So there's nothing in this letter from
4 EPA that says that the credits are not valid or
5 invalid, is that correct?

6 A Right, but this is not the only
7 communication we've had from EPA on this issue
8 over the last couple of years.

9 Q Is there any other communication in this
10 record from EPA?

11 A I don't have my reference section along
12 with my main section. I'm not sure if there is.

13 Q Okay. Who's the air quality permitting
14 agency for the Walnut Energy Center project?

15 A It's the San Joaquin Valley APCD.

16 Q Is the use of these two ERCs disallowed
17 by any CEC regulation?

18 A They're not specifically, as such. But,
19 it's --

20 Q Is that a no?

21 A -- it's clear that the CEC cannot allow
22 licensing of a project that does not meet federal
23 law.

24 Q Okay, just so I have a clean record, is
25 there a CEC regulation that would disallow the use

1 of these ERCs? Yes or no, please.

2 A I think my interpretation is yes.

3 Q Which regulation?

4 MS. HOLMES: If I can cut this short. I
5 think that the witness has already testified that
6 the basis of his concern is conformity with
7 federal law.

8 We can make him go through the
9 regulations and find the section that says the
10 staff assessment shall assess the project's
11 conforming with federal law. But it seems to me
12 that he's already answered that question.

13 MR. HARRIS: Well, actually what peaks
14 my interest in this was the reference to the
15 override statute in Mr. Walters' direct testimony,
16 Public Resources Code 25525 was referenced by Mr.
17 Walters. And I'm wondering whether he's
18 suggesting that there's a need for an override
19 here.

20 MS. HOLMES: As a matter of law we can't
21 override federal law. So I don't --

22 HEARING OFFICER VALKOSKY: Precisely.
23 You know, if he is suggesting it, so what. That's
24 what it comes down to.

25 MR. HARRIS: I just -- it is the staff's

1 suggestion that section 25525 override is required
2 for this project?

3 MS. HOLMES: No.

4 MR. WALTERS: No.

5 MR. HARRIS: I'll take the answer from
6 the witness and the attorney.

7 (Laughter.)

8 MR. HARRIS: Happily, they were the
9 same.

10 BY MR. HARRIS:

11 Q Is the use of these two ERCs disallowed
12 by CARB regulation?

13 A To tell you the truth I've been focusing
14 on the EPA regulations since they've been the one
15 that's brought up this issue. So I'm not aware of
16 yes or no on that.

17 Q So you're not aware of any CARB
18 prohibition, is that -- I just want to make sure I
19 heard you correctly.

20 A I'm not aware if there is or isn't.

21 Q Okay, thank you. Is there any state law
22 that you're aware of that would disallow the use
23 of these ERCs?

24 A Well, I think we've basically gone over
25 the fact that there's two sections of the

1 California Public Resources Code. So those would
2 be the two parts of the California law that I'm
3 looking at that then cite federal law.

4 Q And those again were which sections?

5 A 25523 part (d)(2); and 25525.

6 MS. HOLMES: If it would help the
7 Committee staff can provide citations in its brief
8 to those sections of the Warren Alquist Act that
9 direct the Commission to insure conformity with
10 federal laws.

11 HEARING OFFICER VALKOSKY: I think
12 that's appropriate for the Committee.

13 MR. HARRIS: I just needed to know the
14 sections so I could write my brief.

15 BY MR. HARRIS:

16 Q Is the use of these two ERCs disallowed
17 by any federal regulations that you're aware of?

18 A Specifically or by interpretation?

19 Q Specifically.

20 A I'm not sure that there's anything in
21 the federal law that specifically identifies
22 these -- well, number one, there's nothing in
23 federal law that specifically identifies these two
24 ERCs.

25 And I don't think there's anything

1 specific in the federal Clean Air Act that gets
2 into -- well, that gets into the level of the
3 specifics that we're dealing with here.

4 Q So, neither federal law nor federal
5 regulation?

6 A Well, EPA's interpretation of their
7 regulation.

8 Q Okay. Interpretation of which
9 regulation?

10 A The exact part of the Clean Air Act, I'd
11 probably have to go back and take a look at the
12 EPA letter on this case, or maybe Pastoria or San
13 Joaquin. And I'm not sure exactly which letter
14 provides the proper reference.

15 Q Exhibit 36 is the letter in this case,
16 and you have a copy of that, I understand. Is the
17 reference in that letter?

18 A Not specifically in this letter, no.
19 But I have seen reference in past letters that
20 deal directly with this issue.

21 Q Thank you. Does the San Joaquin APCD
22 agree with your conclusions regarding the validity
23 of these two ERCs?

24 A No, I think we've established they do
25 not.

1 Q We've kind of already been over this
2 ground but I want to quickly touch back again on
3 AQC8. So there are two separate issues you have
4 with this, but basically that EPA must approve
5 rule 2201 before these ERCs can be used. Is that
6 your position?

7 A It's our position as we've noted, that
8 we can refine the condition to note exactly what
9 part of rule 2201 and which version of rule 2201
10 that are going to require to be approved, and that
11 approval is specific to the accounting procedures
12 for ERCs that show equivalency with the federal
13 offset requirements of the new source review.

14 Q So, again, so I have a clean
15 understanding. Is it your claim that this EPA
16 approval is required by federal law or federal
17 regulation?

18 A It is my understanding that rule 2201
19 isn't valid under federal law until it's approved.

20 Q Okay, if you'll give me just a minute I
21 can truncate this, if you can believe that at this
22 point.

23 (Pause.)

24 BY MR. HARRIS:

25 Q In your testimony on page 4.1-53 you

1 make the following statement, 4.1-53, first full
2 paragraph at the bottom. You state, quote, "For
3 now staff is considering these credits to be
4 conditionally valid and has included condition
5 AQC8 to insure that these credits are valid when
6 they surrender."

7 MS. HOLMES: I'm sorry, I --

8 MR. HARRIS: Page 4.1-53. Bottom of the
9 page. I'm sorry, first full paragraph near the
10 bottom. Did you find the reference?

11 MS. HOLMES: I think this is the
12 different pagination issue that we had at the last
13 hearing. We're not finding it. What's the
14 heading?

15 MR. HARRIS: The top --

16 HEARING OFFICER VALKOSKY: It's right
17 above the heading, staff proposed mitigation. In
18 fact it's four lines up from that.

19 MS. HOLMES: Thank you.

20 MR. HARRIS: Do you have that in front
21 of you now?

22 MS. HOLMES: Yes.

23 BY MR. HARRIS:

24 Q Do you see the quote that I pulled out
25 there?

1 A Exactly where in the paragraph?

2 Q It's the sentence that reads: For now
3 staff is considering these credits to be
4 conditionally valid and has included condition of
5 certification AQ-C8 to insure that these credits
6 are valid when surrendered."

7 A Yes.

8 Q Okay. Is there authority in federal law
9 for the Energy Commission Staff to, quote,
10 "validate" or confirm they're valid ERCs?

11 Want me to restate the question?

12 MS. HOLMES: I don't understand the
13 question.

14 BY MR. HARRIS:

15 Q Is there authority -- the language that
16 I quoted says staff considers these to be
17 conditionally valid. I'm looking at the word
18 valid. Is there authority in federal law for the
19 staff to validate or find valid ERCs?

20 A In federal law, no. The Commission's
21 authority is all based on state law.

22 Q Is there authority in state law then for
23 the Commission Staff to, quote, "validate" ERCs?

24 A I believe that we generally do a LORS
25 analysis for all the regulations. And again,

1 taking a look at the two specific provisions in
2 the Public Resources Code I think we do have to
3 make an assessment on the validity of all the
4 proposals in a project.

5 MR. HARRIS: I think I have no more
6 questions.

7 HEARING OFFICER VALKOSKY: Okay. Just a
8 couple points of clarification, Mr. Walters.

9 I take it -- I'm referring to exhibit 11
10 starting on page 4.1-63 the heading refers to
11 preliminary determination of compliance conditions
12 -- I take it that's just a typo, and in fact
13 exhibit 11 contains the conditions from the final
14 determination of compliance?

15 MS. HOLMES: I'm sorry; again I'm having
16 trouble following.

17 MR. HARRIS: It's right below 8, Caryn,
18 the --

19 HEARING OFFICER VALKOSKY: Yeah.

20 MR. HARRIS: -- heading below AQC8.

21 MS. HOLMES: Oh, I see. It's a heading.
22 Yeah.

23 MR. HARRIS: District -- yeah. It says
24 District preliminary determination of compliance
25 conditions instead of final.

1 MR. WALTERS: Yeah, I'm sorry, that was
2 a --

3 HEARING OFFICER VALKOSKY: I mean
4 that's, that was --

5 MR. WALTERS: That was a conforming
6 change; we just forgot the --

7 HEARING OFFICER VALKOSKY: Yeah, that's
8 fine. I just wanted to make sure we got the same
9 conditions.

10 First of all, regarding ammonia slip, in
11 your opinion is it necessary to lower the ammonia
12 slip level to 5 ppm in order to prevent a
13 significant adverse environmental impact?

14 MR. WALTERS: I think it's our opinion
15 that reducing PM2.5 and PM10 through secondary
16 formation to the extent feasible is reasonable,
17 since we know we have essentially significant
18 problems with those two pollutants.

19 HEARING OFFICER VALKOSKY: Okay, let me
20 rephrase that. Would ammonia slip level of 10 ppm
21 result in a direct or cumulative significant
22 adverse environmental impact?

23 MR. WALTERS: I haven't done the
24 modeling to determine that, nor do I think staff
25 has a specific number of microgram per cubic meter

1 or tons per year that they use at this point for
2 that kind of estimate.

3 HEARING OFFICER VALKOSKY: Does the
4 ammonia slip level have to be reduced to 5 ppm in
5 order to comply with any applicable LORS?

6 MR. WALTERS: No, I don't think so.

7 HEARING OFFICER VALKOSKY: Okay, thank
8 you. In relation to condition AQC8 dealing with
9 the ERCs, would it be possible -- and again I
10 mention for the second time, I think it's hopeful
11 that you've indicated that you'd be amenable to
12 some type of refinement in that condition -- could
13 that condition also be rephrased to essentially
14 put a presumption of validity to those credits?

15 For example, is it possible, in your
16 opinion, to start off saying the ERCs may be used
17 unless EPA invalidates them, or something along
18 that line?

19 MR. WALTERS: Maybe something more along
20 the line of if EPA disapproves this specific
21 portion of rule 2201 or disapproves --

22 HEARING OFFICER VALKOSKY: Okay.

23 MR. WALTERS: -- the attainment plans.

24 HEARING OFFICER VALKOSKY: Okay.

25 MR. WALTERS: That's similar, but --

1 HEARING OFFICER VALKOSKY: Yeah, I
2 understand. Is this something, Mr. Harris, on
3 which you're subject to discussion as far as
4 applicant is concerned?

5 MR. HARRIS: I was actually asking Mr.
6 Rubenstein his opinion of your question, so I
7 apologize.

8 HEARING OFFICER VALKOSKY: No, I meant,
9 I'm just talking basically to the rephrasing of
10 that condition, because it seems to me, frankly,
11 that this may be something that can be resolved.
12 And if we don't resolve it over lunch, it may be
13 something we could continue this sole item until
14 the 9th. Just trying to get a feeling whether
15 that would be a productive exercise.

16 MR. HARRIS: We're certainly amenable to
17 trying to get the issue resolved. A presumption
18 of validity is a step in the right direction
19 obviously. But I would like to talk with our
20 experts --

21 HEARING OFFICER VALKOSKY: Certainly, I
22 understand. I'm not looking for a commitment now.
23 Let me go back. Is there any objection if we
24 revisit that sole issue in air quality on the 9th?

25 MS. HOLMES: No objection.

1 HEARING OFFICER VALKOSKY: Okay.

2 MR. HARRIS: I want to make sure I
3 understand, Mr. Valkosky. So we close the record
4 on everything in air quality except for the
5 narrow, the single issue of language for AQC8?

6 HEARING OFFICER VALKOSKY: That would be
7 correct. That's what we'd do today.

8 MR. HARRIS: And if we don't reach any
9 resolution, we just close the record without any
10 resolution?

11 HEARING OFFICER VALKOSKY: Then it's
12 closed, yeah. Then it stands where it is.

13 MR. HARRIS: That's more than
14 reasonable, yeah.

15 HEARING OFFICER VALKOSKY: Okay, with
16 that, redirect.

17 MS. HOLMES: Thank you. I'll start with
18 that issue since the window may be closing.

19 REDIRECT EXAMINATION

20 BY MS. HOLMES:

21 Q Mr. Walters, in the letter that has been
22 identified as exhibit 36, is there a reference to
23 EPA informing the District that prebaseline ERCs
24 are not surplus?

25 A Yes, it's in the fourth paragraph down,

1 first sentence, I believe.

2 Q And is it your general understanding of
3 federal law that an offset must, in fact, be
4 surplus in order to be valid?

5 A I believe that's one of four different
6 criteria for an ERC to be considered.

7 Q And do you know which agency is
8 responsible for insuring conformity with the
9 federal Clean Air Act?

10 A Yeah, that would be USEPA.

11 Q Thank you. Just a few moments ago there
12 was a discussion about the contribution of ammonia
13 slip to secondary particulate. Is it your
14 testimony that although you didn't quantify the
15 contribution that ammonia slip does contribute to
16 secondary particulate?

17 A Yes, the ammonia from various ammonia
18 slip SCRs would definitely contribute to part of
19 the secondary PM10.

20 Q And does staff consider the ambient air
21 quality in San Joaquin to have a significant
22 particulate problem?

23 A Staff does, obviously with the fact that
24 it's one of the few areas that's considered a
25 serious nonattainment area.

1 Q Would it be -- sorry.

2 A And the levels of PM2.5 that have been
3 shown to be in various areas of the Valley.

4 Q So it would be fair to say that the
5 project's ammonia slip could result in a
6 contribution to a cumulative significant PM10
7 impact and PM2.5 impact?

8 A Yes, that's correct.

9 Q And in your mind would that contribution
10 be lower with an ammonia slip level of 5 than it
11 would be with an ammonia slip level of 10?

12 A Yes.

13 Q Earlier this morning, maybe it was this
14 afternoon, Mr. Harris asked you some questions
15 about BACT and feasibility. I want to revisit
16 that just briefly.

17 Did staff base its recommendation for a
18 5 ppm level solely on the fact that it's feasible?

19 A No, we did not.

20 Q Does staff consider other factors such
21 as the attainment status of the district?

22 A Yes, we do.

23 Q Do we consider the severity and
24 frequency of particulate violations?

25 A Yes.

1 Q Finally one last question. The very
2 first cross-examination question that you received
3 from Mr. Harris had to do with the equilibrium
4 equation that you said was not in your testimony.

5 Did you provide that information in
6 response to the discussion in the applicant's
7 testimony about the study performed by the San
8 Joaquin District?

9 A I believe it was partially trying to
10 discuss the study and staff's understanding of the
11 study.

12 Q Okay, thank you.

13 MS. HOLMES: Those are all my redirect
14 questions.

15 HEARING OFFICER VALKOSKY: Recross, Mr.
16 Harris?

17 MR. HARRIS: If you'd give me just one
18 moment, please.

19 Yes, briefly.

20 REXCROSS-EXAMINATION

21 BY MR. HARRIS:

22 Q We're back at exhibit 36, the EPA
23 letter. Does that letter say definitively that
24 these ERCs are not surplus?

25 (Pause.)

1 MS. HOLMES: You can read the letter if
2 you'd like.

3 (Pause.)

4 MR. WALTERS: It doesn't say so in so
5 many words, but I think it can be inferred
6 considering who the letter is sent to and their
7 knowledge of the status of the attainment plans.

8 BY MR. HARRIS:

9 Q Thank you. On the -- back to BACT --
10 BACT feasibility, you said the recommendation on
11 ammonia slip was not based solely on feasibility;
12 that it's based on other factors, is that correct?

13 A Yes, that's correct.

14 Q How do you square the existence of those
15 other factors like attainment status with your
16 prior statement that you're going to require 5 ppm
17 everywhere?

18 A Well, I think the two statements are a
19 little different because you're asking me what I'm
20 doing for this project. I don't know what we're
21 going to do for future projects.

22 Q Just looking for some consistency here.
23 You said it wasn't based solely on feasibility;
24 there are other factors. And you listed as those
25 other factors attainment status, violations, and

1 those kind of things. Are those the factors that
2 you listed in your testimony, is that correct?

3 A Right, for this project.

4 Q How do you square that with your prior
5 statement that you're going to require 5 ppm
6 everywhere?

7 A I said that was my understanding that we
8 probably would identify 5 ppm everywhere. But in
9 order to square that --

10 Q I'm sorry?

11 A -- in order to square that I think we
12 have to indicate that everywhere includes those
13 places where power plants are going to be, and
14 generally everywhere is nonattainment with
15 California ambient air quality standards.

16 So, unless we're going to get a power
17 plant in Lake County, we're still going to have an
18 issue with nonattainment.

19 Q Shall we consider that preapproval of
20 the Lake County projects we might have?

21 (Laughter.)

22 MS. HOLMES: Dream on, Jeffery.

23 MR. HARRIS: I have got one.

24 I have no further questions.

25 HEARING OFFICER VALKOSKY: Thank you,

1 Mr. Harris. Are there any other questions of the
2 witness?

3 PRESIDING MEMBER BOYD: I'm struggling
4 with this a little bit, you know, sitting here in
5 a judicial capacity and making any statements that
6 prejudice this, but I am troubled by the seeming
7 finding that the San Joaquin Valley District
8 doesn't seem to be concerned about particulate
9 matter, i.e., PM10 or PM2.5, if their rule is 10
10 PM for the ammonia slip.

11 And our goal in the future, depending on
12 the situation, is going to be 5. It seems to me
13 we've turned over a policy issue that needs to be
14 resolved outside of this particular forum. But
15 nonetheless it is part of the debate that's going
16 on here. It does weigh heavily on me at the
17 moment, but that's not a question, that's just a
18 statement kind of in summary before I collapse
19 from lack of lunch here, pretty soon.

20 HEARING OFFICER VALKOSKY: Is there any
21 public comment on the area of air quality? Seeing
22 none, Ms. Holmes, did you move your exhibits?

23 MS. HOLMES: I'd like to move that the
24 air quality portions of exhibit 11 and exhibit 47
25 be moved into evidence at this time.

1 HEARING OFFICER VALKOSKY: Objection?

2 MR. HARRIS: Actually no objection, but

3 I would like to note that the authors of the
4 testimony are listed as Mr. Walters and Lisa
5 Blewitt. I think I'm probably saying that wrong,
6 but it's unusual that she was not here. But we
7 don't consider ourselves to have been in any way
8 deprived of cross or anything. So we will not
9 object.

10 HEARING OFFICER VALKOSKY: Okay, fine.

11 No objections, those portions of exhibits 11 and
12 47 are admitted.

13 Is there any public comment on the area
14 of air quality? Okay.

15 As I said before we will close the
16 record on air quality with the exception that we
17 will reserve the right to revisit any
18 modifications to condition air quality-C8 on the
19 9th, which is our next hearing.

20 Can we go off the record for a moment,
21 please.

22 (Off the record.)

23 HEARING OFFICER VALKOSKY: Okay,
24 discussed additional scheduling concerns while off
25 the record.

1 And at this point we will take a
2 luncheon recess and reconvene at 2:00 p.m. See
3 you later.

4 (Whereupon, at 1:23 p.m., the hearing
5 was adjourned, to reconvene at 2:00
6 p.m., this same day.)

7 --o0o--

1 AFTERNOON SESSION

2 2:09 p.m.

3 HEARING OFFICER VALKOSKY: We are
4 reconvening to hear argument on the topic of land
5 use and very brief testimony on the topic of
6 alternatives.

7 Before we begin land use is there
8 objection to the Committee taking official notice
9 of those documents identified as exhibits 48
10 through 54?

11 MS. HOLMES: There's no objection, but
12 there's one that's missing that I failed to
13 identify. It is City of Turlock resolution number
14 93-043. I only have 42 listed, and I believe it
15 has the same date, but I can confirm that.

16 I take it back, it's 41.

17 HEARING OFFICER VALKOSKY: That's
18 resolution 93-041?

19 MS. HOLMES: 41, and it is dated 15th of
20 March 1993. It is a resolution certifying as
21 complete and adequate the final environmental
22 impact report pursuant to the adoption and
23 implementation of the 1992 Turlock General Plan
24 Update.

25 The other resolution from that year is

1 the one certifying the override finding.

2 I apologize, that was my omission.

3 HEARING OFFICER VALKOSKY: Okay, so --

4 MR. HARRIS: If it's easier we could
5 make it part of the existing exhibit, Caryn. Just
6 say those two are one. Instead of giving a whole
7 new number, Mr. Valkosky, we could just -- I don't
8 have the exhibit in front of me; I'm sorry I don't
9 have the number.

10 HEARING OFFICER VALKOSKY: That would be
11 part of exhibit 50, then.

12 MR. HARRIS: Okay, it'll be part of 50,
13 perfect.

14 MS. HOLMES: Yeah, there were two
15 separate resolutions for essentially the same
16 thing, certifying the EIR and then adopting the
17 statement of overriding considerations. One was
18 41 and one was 42.

19 MR. HARRIS: And both adopted the same
20 date.

21 MS. HOLMES: Right.

22 HEARING OFFICER VALKOSKY: And 41
23 certifies the EIR. Okay, are you going to docket
24 a copy of that, Ms. Holmes?

25 MS. HOLMES: I certainly can.

1 HEARING OFFICER VALKOSKY: That would be
2 good. Do you have any extra copies -- oh, sorry.

3 MS. HOLMES: I don't -- excuse me, I
4 don't believe we docketed any of the other records
5 for which we asked for --

6 HEARING OFFICER VALKOSKY: Oh, none of
7 them are docketed?

8 MS. HOLMES: No, I believe we just had
9 copies made for you. We can docket the whole, all
10 of them, if you'd like.

11 HEARING OFFICER VALKOSKY: Would you,
12 please.

13 MS. HOLMES: Yes. Yes.

14 HEARING OFFICER VALKOSKY: Okay, with
15 that addition to exhibit 50, specifically
16 resolution 93-041, is there objection to the
17 Committee officially noticing these, Mr. Harris?

18 MR. HARRIS: No objection.

19 HEARING OFFICER VALKOSKY: Okay. We'll
20 take notice of those documents then, and remind
21 staff to docket copies of them. If you could
22 provide me a separate copy of 93-041 I would
23 appreciate that.

24 Okay, Mr. Harris.

25 MS. HOLMES: Can I interrupt for just a

1 moment? I was under the impression that we were
2 going to have the evidence entered into the record
3 first before the oral argument, since it's
4 going --

5 HEARING OFFICER VALKOSKY: Right, --

6 MS. HOLMES: -- since it's going in by
7 declaration.

8 HEARING OFFICER VALKOSKY: Yeah, it's up
9 to Mr. Harris to --

10 MS. HOLMES: Oh, I'm sorry, I thought he
11 was beginning to --

12 HEARING OFFICER VALKOSKY: -- to move--

13 (Laughter.)

14 HEARING OFFICER VALKOSKY: -- his
15 declaration --

16 MS. HOLMES: It looked quite serious.

17 MR. HARRIS: Yeah, for once I was quite
18 serious.

19 Okay, so we're going to put our evidence
20 in and your part of the FSA in, and then we'll do
21 the oral argument. That's extremely logical and
22 no wonder I didn't think of it.

23 Our land use witness is John Carrier.
24 His prior filings are exhibits 1, exhibit 2,
25 exhibit 5 and exhibit 10. In addition the

1 documents we just discussed that are going to be
2 officially noticed and are now going to be
3 docketed, are part of that testimony, as well.

4 So I would move Mr. Carrier's testimony
5 and those exhibits into evidence.

6 HEARING OFFICER VALKOSKY: Is there
7 objection?

8 MS. HOLMES: No objection.

9 HEARING OFFICER VALKOSKY: Okay. Staff.

10 MS. HOLMES: Thank you. Staff's witness
11 in the area of land use is Mr. David Flores. His
12 testimony was included in the FSA part one, which
13 has been identified as exhibit 11, along with a
14 statement of his qualifications and a declaration.

15 At this point I would ask that his
16 testimony be received into evidence.

17 HEARING OFFICER VALKOSKY: Is there
18 objection?

19 MR. HARRIS: No objection.

20 HEARING OFFICER VALKOSKY: The
21 aforementioned exhibits are admitted into the
22 record.

23 Is there any public comment on the
24 factual portion of the land use topic? Seeing
25 none, we'll proceed with legal argument.

1 Mr. Harris.

2 MR. HARRIS: Thank you, Mr. Valkosky.

3 I'm going to stand this time and see if I can keep
4 myself awake after lunch.

5 I want to do several things, and the
6 first thing I'm going to do is just kind of walk
7 through the factual history here, because I think
8 it's very important. We've taken the testimony by
9 declaration, so the Committee needs a certain
10 factual underpinning to be able to understand the
11 legal arguments that will follow.

12 So I'm going to, in hopefully the most
13 objective terms possible, Ms. Holmes, lay out the
14 facts. Although she certainly has the right to
15 add or subtract, as need be. But I'll try to
16 basically frame up the factual issues for you
17 before turning to the legal issues. So, let me
18 turn to those now.

19 The WEC site is located on an 18-acre
20 portion of a 69-acre parcel. That parcel is
21 within a I zone, an industrial zone within the
22 City of Turlock.

23 The WEC and its project site are
24 consistent then with the types and the densities
25 of uses that are allowed by those establishing

1 zoning ordinance and general plan.

2 In the period of 1991 through 1993 the
3 City of Turlock undertook a process of updating
4 its general plan. The general plan authorized the
5 conversion of approximately 4700 acres in total.
6 Of that 4700 acres 3200 acres were designated as
7 prime farmland. So the City added 4700, again
8 3200 of those prime farmland.

9 And the use is designated there as from
10 agriculture uses to urban uses or nonagricultural
11 uses. The WEC site is located again in this area.

12 Prior to adopting the general plan
13 update the City of Turlock prepared, pursuant to
14 CEQA, a notice of preparation which was issued on
15 February 11th of 1992; a draft EIR and master
16 environmental assessment that was circulated for
17 public review from October 1st of 1992 to November
18 22nd of 1992; and a final EIR was issued on
19 December 28, 1992.

20 The draft EIR, together with a final EIR
21 and the master environmental assessment contain a
22 detailed discussion of the impacts of the proposed
23 project including the conversion of 4700 acres of
24 land, again from ag to urban uses. That EIR
25 concluded that the proposed conversion would

1 constitute a significant effect that could not be
2 mitigated to a level of less than insignificant.

3 On the ag issue the EIR analyzed four
4 reasonable alternatives to the general plan update
5 that would be capable of hopefully eliminating any
6 significant effect or reducing them to a level of
7 insignificance. The alternatives were reviewed
8 and considered by the City Council in regard to
9 their updating of their general plan.

10 Prior to adopting that general plan
11 update the City of Turlock adopted resolution 93-
12 042 that found that certain environmental effects
13 were significant, as identified in the final EIR,
14 including the conversion of that farmland. They
15 also found that they had not been able to, or were
16 unable to -- excuse me, were unable to completely
17 mitigate or eliminate those significant effects,
18 so therefore a statement of overriding
19 consideration was required by the City Council.

20 The Council found that, quote, "changes
21 or alterations have been required in or
22 incorporated in the plan which would lessen the
23 significant effects to long-term agricultural
24 impacts production as identified in the EIR.
25 However, specific economic, social and other

1 considerations make infeasible any mitigation
2 measures or project alternatives to avoid the
3 significant adverse effect identified in the EIR."

4 So, again, with regard to the conversion
5 of the agricultural land, including the parcel
6 where the WEC project sits, the Council adopted a
7 statement of overriding consideration that said
8 and concluded, quote, "It is not feasible to fully
9 mitigate the impacts to a level of insignificance.
10 The only measures that would eliminate impacts on
11 ag land conversion would represent substantial" --
12 excuse me, let me try that again -- "The only
13 measures that would eliminate impacts on ag lands
14 would represent substantial changes to the
15 proposed plan and further expansion of the present
16 city limits of urbanization, thereby restricting
17 the ability of the City to meet its current and
18 future residents' needs for employment, goods and
19 services, and housing opportunities."

20 "The City Council finds that the ability
21 of the City to insure that there's a balance of
22 jobs and housing and sufficient services to the
23 residents of the community as growth occurs
24 outweighs the risk of farmland conversion in the
25 planning area."

1 So the statement of overriding
2 consideration, the general plan update, the final
3 EIR were all supported by substantial evidence in
4 the record, including the relevant testimony of
5 public, taken at approximately 14 public
6 workshops. Those workshops were held between
7 February of 1991 and March of 1993. That's the
8 early '90s.

9 Now in 2002, this is just last year, the
10 City reviewed the general plan as is required by
11 the Government Code. As part of this review the
12 City prepared a negative declaration of
13 environmental effect for the 2002 review of the
14 Turlock general plan, and recertified the EIR
15 prepared for the 1992 general plan as adequate and
16 complete for the 2002 general plan update.

17 So, 2002 they go through the process
18 again. This is just last year.

19 The City also prepared in 2002 a master
20 environmental assessment which accompanied its
21 1992 general plan update and EIR. Based on its
22 review of the general plan and the revised master
23 environmental assessment, and the negative
24 declaration, the Turlock City Council concluded no
25 substantial changes are proposed to the general

1 plan EIR which will require major revisions to the
2 general plan EIR. No new information which was
3 not known or could not have been known at that
4 time has become available. And that's
5 significant; I'll get to that in a minute.

6 And with respect to the conversion of ag
7 land permitted by the general plan, quote,
8 "Mitigation measures identified in the general
9 plan EIR and the statement of overriding
10 consideration contained in the Turlock City
11 Council resolution 93-042 are adequate to mitigate
12 the impacts of the proposed project where
13 feasible." And they incorporate here by
14 reference.

15 So after certifying the 1992 final EIR
16 the City Council further concluded in its 2002
17 deliberations no substantial changes have occurred
18 with respect to the circumstances under which the
19 statement of overriding considerations was
20 adopted. And no new information which was not
21 known or could not have been known at the time of
22 the statement of overriding consideration was
23 adopted has become available.

24 Therefore, the statement of overriding
25 consideration for the Turlock general plan is

1 still adequate and is incorporated here by
2 reference.

3 So the impacts of the conversion of this
4 farmland were analyzed really in five different
5 documents. They were analyzed in the 1992 master
6 environmental assessment and draft EIR, that's
7 number one.

8 Number two, they were analyzed in the
9 1992 final EIR. Number three, they were analyzed
10 in the 1992 statement of overriding
11 considerations. That's number three.

12 Number four, the 2002, just last year,
13 review of the general plan, they were analyzed.
14 And fifth, negative declaration recertifying the
15 1992 EIR all consider these effects.

16 So this is not a new effect. It's not
17 something that just popped up because the Energy
18 Commission is reviewing the WEC project. This has
19 been a very detailed and thorough local process.

20 That's the factual background. Turning
21 to the issues of law, I want to start with the
22 most basic one. And I think that is simply this.
23 As a matter of law, as a matter of law the
24 conversion of 18 acres does not represent a
25 significant impact under CEQA.

1 As a matter of law I don't think you can
2 impose mitigation measures without the finding of
3 a significant impact. In fact, CEQA says exactly
4 that in simple terms. CEQA guidelines, which are
5 the 14 of the California Code of Regulations
6 section 15126.4(a)(3) says, quote:

7 "Mitigation measures are not required
8 for effects which are not found to be
9 significant."

10 Land6 is the condition at issue here.
11 Land6 is offered as a mitigation measure. For the
12 Committee to find that Land6 is required, I
13 believe they must find that there's a significant
14 impact under CEQA.

15 The facts in this case will not support
16 a finding of significant impacts. Again, we're
17 talking about 18 acres of land. In Stanislaus
18 County there are over 28,000 acres of land
19 designated as prime farmland, 28,125. And that's
20 just in Stanislaus County. So let me punctuate
21 that.

22 The conversion of 18 ares of land
23 represents an infinitesimal total of the available
24 farmland. In fact, you take 18 and divide it by
25 28,125, the number you get is 0.00064. So you

1 have to get out to the fourth decimal place before
2 you even see a number here.

3 So, as a matter of law, the 18 acres
4 we're talking about here does not represent a
5 significant impact. That's what CEQA will tell
6 the Committee to find.

7 The Committee also has Energy Commission
8 precedent that they can look to in this regard. I
9 hate to use the "M" word, but the Metcalf case
10 considered very significant, a very similar issue.
11 In the Metcalf case there was 20 acres involved
12 there, 20 acres of land would be converted. In
13 that case there were about 32,000 acres of prime
14 farmland in Santa Clara County.

15 The Committee found in that case that
16 due to the small number of acres that would be
17 converted, as well as the parcel's future use as
18 campus industrial, okay, not industrial, campus
19 industrial, in that case the use was going to be a
20 high tech Cisco Systems campus, for lack of better
21 words.

22 Given the small number of acres and the
23 future use there, and also given that this land,
24 as zoned, would result in other projects being
25 approved to use it, the Committee found that there

1 was not a significant impact under CEQA.

2 So in the case of the WEC we have
3 basically 18 acres out of 28,000, again
4 representing out to six decimal places, or four
5 decimal places, 0.000642. In the case of Metcalf,
6 20 acres out of about 32,000; it's a slightly
7 smaller number but it is nevertheless quite small;
8 it's 0.000625. So, again, you have to get out to
9 four decimal places to even find the impact here.

10 The other thing I would note as well is
11 that those are based on County percentages. If
12 you took a more regional view of this you would
13 find that there's more ag land in the surrounding
14 region here. And so the number in the WEC case,
15 on a regional basis, and I did not calculate this,
16 I apologize, is going to be smaller, I believe.

17 I'm glad to be a liberal arts major,
18 because I've just proven it again, so. That
19 really small number I was talking about, is
20 smaller yet. I'm off by a factor of ten. I lost
21 a comma here. And I'm reading now from the AFC
22 section 9.8. The ag lands is 280,000, not 28,000;
23 so, again, I'm off by a factor of ten there.
24 Sloppy copy on my part.

25 So that number then comes out to be

1 0.0000--, so there's four zeroes now, which makes
2 sense, being off by a factor of ten, --64. --
3 dramatic effect, that's great, John, thank you.
4 Appreciate the clarification there.

5 As you can see, even with a lawyer's
6 error of a factor of ten, the number is small.
7 And with the correct numbers it's even smaller.

8 You've got then two binding precedents I
9 think to consider in this case. The first one is
10 just a basic CEQA analysis; the small number we're
11 talking about here. You also have the
12 Commission's decision in the Metcalf case, and
13 very similar facts where you found no significant
14 impact.

15 So based upon those two I guess binding
16 precedents, I think as a matter of law, as an
17 absolute matter of law the Committee can find that
18 there's not a significant effect that needs to be
19 mitigated. And therefore there's no requirement
20 to have a mitigation measure. Therefore you
21 should strike completely Land6.

22 Now turning to the issue of the
23 Commission's role as the exclusive siting
24 authority for power plants of 50 megawatts or
25 larger, understanding the environmental effects

1 here does require you to think about what would
2 the City do if they were the lead agency. In the
3 most basic, oversimplified sense the Commission
4 stands in the shoes of the local government. Your
5 authority is in lieu of their authority.

6 So a relevant question is always what
7 would the City do if they were in charge here.
8 There's absolutely no doubt that the City would
9 not require the mitigation that staff is asking
10 for here. The proof of that is that the
11 industrial projects that take place within this
12 zone, none of those projects are required to
13 provide the kind of mitigation that staff is
14 seeking.

15 So, as a pure matter of what would the
16 local agency do, the answer is they would not have
17 you do what you're asking us to do here in Land6.
18 So that raises the question by what authority then
19 does the staff ask for such mitigation.

20 Well, I've looked at the Warren Alquist
21 Act. I find nothing that provides the staff with
22 the authority to ask for this type of mitigation.
23 And we looked at other applicable LORS and again
24 we find nothing that asks for the kind of
25 mitigation that the staff is seeking here.

1 So it leads me to believe that maybe
2 it's some kind of staff policy, but it's certainly
3 not a LORS, and it's certainly not a law that is
4 binding.

5 It creates some interesting problems for
6 you, too, in terms of your relationship to the
7 local government. If you follow staff's
8 recommendations, essentially what you're asking
9 Turlock to do is to find 18 acres, and perhaps 18
10 acres within the industrial zone, to replace the
11 18 that are being used for the project.

12 What that does in effect is create an
13 agricultural use in an industrial zone. So if you
14 follow staff's direction here, you're going to
15 create a nonconforming use in the fact that you
16 will have 18 acres reserved in an industrial zone.
17 You'd be mandating, in a sense, a use within the
18 industrial zone that is contrary to what the City
19 wants. It's kind of a reverse override, as
20 somebody described it. It's the Energy Commission
21 coming in and saying, well, your project's
22 consistent with the land use planning, but in this
23 zone we also want ag.

24 And I think this is a relationship
25 between, you know, you as the authority to site

1 power plants, and the local government. That's an
2 important thing to consider. I think that reverse
3 override, for lack of better terms, has some very
4 serious policy implications.

5 So I'd ask you to think about this in
6 terms of what would the local government do if
7 they were in charge here. If this was a 49.9
8 megawatt power plant, for example, and the local
9 government had siting authority, what would they
10 be requiring here.

11 Well, it's absolutely clear that the
12 City would not revisit the farmland issue. They
13 would not come back over these grounds. It does
14 not mean that the City would not do some kind of
15 environmental review. Of course they would do an
16 environmental review, most likely an EIR.

17 So the question becomes then what would
18 be the scope of that review by the City. What the
19 City would do for this project, like it does for
20 every other project that comes forward in an
21 industrial zone, they will look for effects that
22 are said to be peculiar to the project, or the
23 project site. It's not a term I particularly
24 like, but it's one that CEQA uses. And if I say
25 particular instead of peculiar, please excuse me.

1 I seem to have that problem.

2 The City would look at this use and say
3 what are the effects that are peculiar to this
4 project or this site. And in this case there are
5 no farmland impacts that are peculiar to this
6 site. The thing you need to focus on here, the
7 impact that's claimed is the conversion of
8 farmland. Any use on this property is going to
9 result in that effect. So there's nothing
10 peculiar to this project or this site that would
11 allow this kind of mitigation to be imposed.

12 The land is industrial zoned. There's
13 nothing unique about it. Any similar use that
14 comes into this zone is not going to be required
15 to mitigate as such. The same use, a 499 facility
16 next door from another would not be required to
17 provide the kind of mitigation that is asked for.

18 Frankly, the staff is not free to ignore
19 the City's prior actions. They're not free to
20 ignore the statement of overriding consideration
21 or the environmental documents. And they're not
22 free to choose that they can impose some
23 additional mitigation.

24 There are two legal authorities that I
25 want to talk about briefly that support that

1 statement. First is a generalized principle in
2 CEQA that CEQA does not grant new and different
3 authorities. In other words, the authorities
4 under CEQA are derived from the applicable LORS.

5 And second I want to talk about a
6 specific CEQA provision that I think does apply in
7 this circumstance.

8 CEQA does not create some ubiquitous
9 CEQA authority for the Commission Staff. And we
10 heard a little bit of that this afternoon or this
11 morning in discussions about air issues, you know,
12 what are the LORS, or what are the -- you know,
13 why are you requiring this mitigation. Well, CEQA
14 requires it. And I think that's generally a true
15 statement.

16 But that CEQA jurisdiction, if you will,
17 is not unlimited. In fact, in the CEQA guidelines
18 in section 15040 that's entitled appropriately
19 enough, authority provided by CEQA, there are
20 clear limits placed upon what the staff can look
21 at under its CEQA authority. And there are four
22 subdivisions there. I'm going to focus really on
23 two.

24 The first one is subdivision (b), and it
25 says quite plainly, there's an important

1 limitation on the CEQA authority of the staff. It
2 says, quote, "CEQA does not grant an agency new
3 powers independent of the powers granted to the
4 agency by other laws."

5 So, hence the questions that come from
6 this side of the table. What laws are you talking
7 about? What state law? What federal law? What
8 state regulation? What federal regulation?

9 Similarly, the Warren Alquist doesn't
10 grant some ubiquitous authority to the staff.
11 They are constrained by the strictures of existing
12 laws and the regulations and ordinances.

13 The provision of law that I want to
14 focus on, the second provision, is actually two
15 different provisions; one statute and one
16 accompanying guideline. It's Public Resources
17 Code 21083.3. And the accompanying guideline is
18 CEQA guideline 14CCR15183, so 15183.

19 Those guidelines describe the scope of
20 the environmental review that should take place on
21 this farmland issue. They describe specifically
22 the scope of environmental review for projects
23 that are consistent with community plans for
24 zoning. In this case the project is consistent
25 with community plans and zoning.

1 Again, not surprisingly, the title of
2 that section of 15183 is projects consistent with
3 the community plan or zoning. John, can you pass
4 out those single sheets?

5 I've got a single sheet of paper which
6 has on it the full text of the first subsection of
7 15183.

8 (Off-the-record remarks.)

9 MR. HARRIS: A couple of notes. First
10 off, this is one provision out of a section, I
11 think, that has multiple subsections. And I've
12 got the entire provision I can pass out later.

13 UNIDENTIFIED SPEAKER: (inaudible).

14 (Pause.)

15 MR. HARRIS: The language you have in
16 front of you is subsection (a). I think that
17 provision goes all the way through. It's three
18 pages long or four pages long. It goes through
19 subsection (j).

20 I wanted to call this one out first
21 because well, it is the first section, and it does
22 set the context for everything that follows. I
23 think in the purpose of an oral argument I'll just
24 focus on this section so I don't keep you here any
25 longer than I'm going to have to already.

1 The text of this section I think is very
2 important because it says exactly what the Energy
3 Commission ought to do on this farmland issue. So
4 what I want to do is to use the famous quote, I
5 want to parse the language. I want to go through
6 and take a look at the words and let's figure out
7 if they mean what they say, and they say what they
8 mean.

9 So, let's start with the very first two
10 words, CEQA mandates. And typical lawyer, I can't
11 get past the second word before I've got to say
12 something. But it's important. Mandates is an
13 important choice of words here. It's not CEQA
14 allowed, it's not CEQA it says you may, or CEQA
15 says you could, it's CEQA mandates. This s a
16 directive. It's a very clear directive. There's
17 no discretion, in my view, based upon those words.

18 The next phrase, and I'll take these in
19 chunks, and I apologize for not dividing them up
20 on the text, but I thought it would look choppy.
21 "CEQA mandates that projects which are consistent
22 with development density established by existing
23 zoning, community plan and general plan policies."
24 I'll stop there.

25 We're talking about projects that are

1 consistent basically with the general plan and the
2 zone. This project is precisely that type of
3 project. This is the case. The project is
4 consistent with the general plan, it's consistent
5 with the zone.

6 Continue reading: "For which an EIR was
7 certified." You remember the long introduction.
8 The EIR was certified for this project, not once
9 but twice. There are five different environmental
10 documents involved here. The last certification
11 of that document occurred in the year 2002. So,
12 again we are still within the strictures of the
13 statute.

14 "Shall not require additional
15 environmental review." This is a streamlining
16 provision. And I think that's a key concept here,
17 because CEQA does allow you to streamline your
18 environmental analysis. And what CEQA is saying
19 here essentially is that for the types of projects
20 described, the words preceding, no additional
21 environmental review is required.

22 It's described as a partial exemption
23 from CEQA. I'll explain what that means later.
24 But I think it's important that you realize that
25 it is an exemption.

1 And then we always get to the except,
2 and these are important, as well. "Except as
3 might be necessary to examine where there are
4 project-specific significant effects which are
5 peculiar to the project or its site." So we're
6 back to my favorite word, peculiar.

7 It's a limited exemption. You've got
8 the word except afterwards, which means you've got
9 to figure out what the exceptions are. And there
10 really are just those two exceptions. Are there
11 project-specific impacts that are peculiar to the
12 project or the site.

13 We're focused on the farmland issues, so
14 I guess I would narrow the question to say are
15 there project-specific significant effects which
16 are -- project-specific agricultural effects --
17 thank you, Caryn, she corrected me with
18 telepathy -- which are peculiar to the site or the
19 project.

20 In terms of the project, itself, the
21 answer is no. There's nothing peculiar about a
22 power plant as it relates to farmland impacts. It
23 has to have a site, but other than that there is
24 nothing that would fit that definition.

25 Any project that would be allowed in

1 this industrial zone is going to have the same
2 effect. So if the Foster Farms' neighbor decided
3 to expand, same effect. If the City expanded its
4 wastewater treatment plant, for example, same
5 effect. If you brought in a 49.9 megawatt
6 facility nearby, same type of effect. So there's
7 nothing about this type of project, power plant
8 project, that has unique farmland impact.

9 And the second half of that question.
10 Are there impacts that are peculiar to the project
11 site. And the answer again is no. There's
12 nothing about this site that is peculiar in terms
13 of its farmland impacts. It is another one of
14 those facilities within the City and County
15 boundaries, literally thousands of acres, that are
16 affected.

17 So, taking a look at that whole first
18 long sentence, it's very clear that this concept
19 absolutely applies to the project that's before
20 you today.

21 I said this has been characterized as a
22 partial exemption, and what that means exactly
23 what I said earlier, you don't escape
24 environmental review all together. If somebody
25 brought in a project that wasn't CEC jurisdiction,

1 but was a power plant, doesn't mean they hand them
2 a license and they start operating. They're going
3 to have to go through an environmental review
4 process.

5 But as to the impacts that have already
6 been identified in the general plan, they're going
7 to be able to look at that and say there's nothing
8 peculiar about the project or the project site,
9 and they're going to have an environmental impact
10 analysis that recognizes that, but does not
11 require additional mitigation.

12 This section also deals with cumulative
13 impacts, and, John, maybe you ought to pass out
14 the rest of the document, as well. I wanted to
15 start by focusing on (a) because I think it is the
16 most important. You will see this is nearly a
17 four-page section with codes and other good stuff.
18 But I'm probably laying a lot of groundwork for
19 Ms. Holmes anyway, who will likely talk about this
20 section.

21 Just for the record, too, the document
22 I'm passing out was literally cut-and-paste off
23 the state website that has the CEQA guidelines.
24 And I cut only this section, the 15183 section.

25 So we've established that there aren't

1 any significant direct impacts. I think the next
2 place staff might go, anticipating where staff
3 might go, is to suggest that there are significant
4 cumulative impacts associated with the project.

5 And I would draw your attention to
6 subdivision (j) which is on page 3; it's the last
7 section. What follows (j) are the notes and the
8 discussion. But sub (j) deals with the idea of
9 cumulative impacts. And let's take a look at that
10 language again. It says "this section does not
11 affect the requirement to analyze potentially
12 significant onsite or cumulative impacts if those
13 impacts were not adequately addressed in the prior
14 EIR.

15 If a significant offsite or cumulative
16 impact was adequately addressed in the prior EIR,
17 then this section may be used as a basis for
18 excluding further analysis of that offsite or
19 cumulative impact.

20 And so I think staff loses, dead-bang
21 loses on the question of direct significant
22 impacts. I think the only other place they can go
23 is to suggest that there's a significant
24 cumulative impact. There is not.

25 And as you see from this language the

1 issue there is whether those impacts were
2 adequately discussed in the prior EIR. I'm going
3 to wait to hear staff's argument on those before I
4 go into too much detail. But let me say clearly
5 this was a detailed process. It was a three-year
6 process, '91 to '93.

7 Ten years later it was a process that
8 involved significant environmental documents, 14
9 public meetings, and an EIR that had to withstand
10 judicial review. Somebody out there had the right
11 to sue. They can sue on anything. And as you
12 know, if you've got one issue you'll sue on every
13 issue you can find.

14 This was thoroughly reviewed. It would
15 withstand a substantial evidence test; this being
16 the EIR. So, I'll be interested to see how staff
17 tries to claim that this was not adequately
18 analyzed in the EIR. It's been found to be
19 significant twice, and the statement of overriding
20 consideration covers those issues quite well.

21 There's a case on point that I'm
22 actually going to skip over and hang onto. Let me
23 just make one last policy argument before I
24 surrender the mike.

25 If this isn't required by the Warren

1 Alquist Act, if it's not required by an applicable
2 LORS, if there's some kind of policy out there
3 that requires this, my first response is that
4 policy is not a basis for a LORS determination.
5 So if it's just the policy, it's just that, it's a
6 policy.

7 But what is the policy of the State of
8 California towards the preservation of ag land. I
9 think that policy is probably best found in the
10 Williamson Act. That Williamson Act is intended
11 to establish a mechanism for preserving ag lands
12 by allowing counties to create ag preserves, and
13 then to enter into contracts with those landowners
14 within those preserves. This is a process
15 outlined in the Government Code, starting at
16 section 15200.

17 It's implemented by the Department of
18 Conservation. And there's actually, at least in
19 the docket here, a letter from the Department of
20 Conservation on this particular issue. That
21 letter comes from the agency that's charged with
22 implementing the Williamson Act.

23 So, if we're going to talk about state
24 policy towards ag land preservation, let's take a
25 look at the Williamson Act and what the Department

1 of Conservation would or could require in this
2 case consistent with the law.

3 Now, if Randy decided, Mr. Baysinger
4 decided today that notwithstanding the impact on
5 its ratepayer owners, that he was going to take
6 that ratepayer money -- and again this isn't a
7 public corporation, it's an irrigation district --
8 if he's going to spend the irrigation district's
9 money on this type of mitigation, for whatever
10 reason he decided he just wanted to do it.

11 If he went to the Department of
12 Conservation and said I want to put this land
13 under Williamson Act they would tell him in no
14 uncertain terms to go away. They would not accept
15 it.

16 What do I mean by that? The Williamson
17 Act has criteria that involve the size of the
18 parcel, the duration of the Williamson Act
19 contract. And there are also termination
20 provisions.

21 The most important of those three is the
22 first one; it's the size of that agricultural
23 parcel. Under California policy, as articulated
24 in California statute, under the Williamson Act,
25 the project must be at least, at least 100 acres

1 before it's eligible for Williamson Act
2 protection. At least 100 acres.

3 We're talking about 18 acres here.
4 We're talking about 18 out of the 69-acre parcel.
5 So if Mr. Baysinger walked in there with his 69-
6 acre parcel the Department of Conservation, they
7 would tell him to go away. Not big enough. It's
8 too insignificant for us to fool with.

9 There is an exception in the Williamson
10 Act for land less than 100 acres. So, maybe we'll
11 come forward and say, gee, let's try to preserve
12 something less. Government Code section 15230
13 does provide that a city or county may establish
14 agricultural preserves of less than 100 acres if
15 it makes two findings.

16 First it has to find that the small
17 preserve is necessary due to some uniqueness of
18 the agricultural enterprises in the area. It will
19 be nothing unique about agricultural enterprises
20 in an industrial zone. So it fails under the
21 first criteria.

22 And in the second criteria, if you want
23 to have less than a 100-acre ag preserve under the
24 Williamson Act, is that that area must be
25 consistent with -- the use in that area must be

1 consistent with the general plan of the county or
2 the city. Ag uses are not consistent with the
3 general plan of the county or the city.

4 So, based purely on the size of the
5 acreage involved here, the Williamson Act tells
6 Mr. Baysinger to take a hike. This parcel is 18
7 acres. The requirement is 100. I'm good enough
8 at math to know that's 18 percent. I missed by a
9 zero before, but I've got 18 out of 100 being 18
10 percent. I'm certain of that. Too small, go
11 away.

12 The other thing to keep in mind is that
13 the Williamson Act has a limited duration. It's
14 typically a ten-year contract, although it could
15 be extended annually for one-year terms. And the
16 Williamson Act also allows for termination, either
17 unilateral termination in that first ten years,
18 subject to penalties, or at the end of the ten-
19 year period, or at the end of any year thereafter
20 without penalty, the landowner can terminate the
21 contract.

22 So, in terms of duration here, the
23 Williamson Act, administered by the Department of
24 Conservation who commented on this project, does
25 not, in perpetuity, as the staff requires, does

1 not in perpetuity require that farmland be set
2 aside.

3 So, I think the whole Williamson Act
4 argument is an important one for this Committee to
5 consider as they're looking at this whole issue.
6 You have before you really, I think, a fairly easy
7 case. This impact is not significant. It's too
8 small. There's no authority for the type of
9 mitigation that's being required.

10 The City, as the lead agency, would not
11 require this. CEQA doesn't give you some
12 generalized authority to require this. Section
13 15183 allows the type of analysis we're talking
14 about. And the Williamson Act makes it impossible
15 for this land to be protected under that state
16 policy.

17 So, I make myself available for any
18 questions.

19 HEARING OFFICER VALKOSKY: I've just got
20 a couple, Mr. Harris. When the City adopted the
21 general plan did it, in fact, specify any
22 mitigation measures for the conversion of the
23 agricultural land in question?

24 MR. HARRIS: As presented in my summary
25 there were four different alternatives considered

1 to potentially mitigate the ag land impacts to a
2 level of less than significant. And each one of
3 those four was considered. They were subject to
4 public meetings and public debates.

5 And at the end of the day the City
6 Council, in certifying the EIR, determined that
7 those measures were not feasible. They determined
8 that in '92 and in 2002. And I think the 2002 to
9 me is really important, because there have been no
10 changed circumstances between 2002 and 2003 that
11 would change that feasibility finding, in my view.

12 HEARING OFFICER VALKOSKY: Were any of
13 the four measures considered by the City, or did
14 any of them involve compensation such as suggested
15 by staff?

16 MR. HARRIS: My understanding is they
17 did not.

18 HEARING OFFICER VALKOSKY: Okay. Last
19 question for now. Under 15183 is there, in your
20 mind, or is it conceivable that there is a
21 difference between projects which are consistent
22 with development plans as opposed to those which
23 are consistent with zoning or general plan
24 policies?

25 MR. HARRIS: I'm sorry, are you reading

1 from (a)?

2 HEARING OFFICER VALKOSKY: Development
3 density, yeah, I'm sorry.

4 MR. HARRIS: There is a definition of
5 development density in the larger section that, if
6 you give me a second, I'll find.

7 I'm sorry, there's a definition of
8 community plan on page 3 of the document under
9 (i)(3). Talks about a community plan. I take
10 zoning ordinance to mean just that, existing
11 zoning being the zoning ordinance. Community plan
12 is defined under that subsection --

13 HEARING OFFICER VALKOSKY: Right, my
14 question is there, in your opinion, another
15 reading of that portion of sentence one that would
16 distinguish between projects which are consistent
17 with development density and projects that are
18 consistent with existing zoning community plan or
19 general plan policies?

20 MR. HARRIS: No. I read those,
21 development density is also defined in the follow-
22 on statute, if I can find that as well. One time
23 it would be good to be sitting down.

24 Yeah, it's section (i)(2) again on page
25 3. The purpose of this section, consistent means

1 that the density of the proposed project is the
2 same as or less than the standards expressed in
3 the involved parcel and the general plan,
4 community plan, or zoning action, which the EIR
5 was certified. The project complies with the
6 density related standards contained in that plan.

7 So maybe I haven't answered your
8 question. I read you the section. Do you want to
9 put it to me again, Mr. Valkosky? I guess I'm not
10 picking up your --

11 HEARING OFFICER VALKOSKY: Yeah,
12 basically what I'm saying is it's one can
13 construe, and I'm not saying I am, I just want to
14 get your thoughts on it, that development density
15 is one thing. There are so many people per area,
16 okay, square area.

17 Consistency with zoning is another
18 thing.

19 MR. HARRIS: Um-hum.

20 HEARING OFFICER VALKOSKY: Okay, I want
21 to know if, in your opinion, those are two
22 different things. Or if development density is
23 subsumed into a zoning or a community plan type of
24 thing.

25 MR. HARRIS: I will tell you, I think I

1 know how this ended up being murky, as you
2 suggest. It talks about development density.
3 When this provision, both the statute and the
4 regulation were first approved, they were limited
5 to residential housing developments.

6 So, in that context the residential
7 housing development, development density has a
8 very specific meaning. My feeling is that in
9 making the amendments to allow this to apply to
10 more than residential, that the language just was
11 not cleaned up.

12 HEARING OFFICER VALKOSKY: Okay, now do
13 you have any basis for that feeling, that
14 construction of it?

15 MR. HARRIS: Yeah, the note attached to
16 the document, the three- or four-page document I
17 handed out, the note there, first section of the
18 note says, this section implements section 180 as
19 amended. The former section authorized limited
20 EIR for residential purposes. And then it was
21 amended to take out the residential limitations.

22 So I think those authorities in the
23 notes, the discussion notes, again which are taken
24 right off the CEQA webpage, I think are helpful.

25 HEARING OFFICER VALKOSKY: Okay, thank

1 you.

2 MS. HOLMES: Good afternoon. I'd like
3 to start just first by saying that staff does not
4 see this as a Williamson Act issue at all. We are
5 not recommending that the Williamson Act come into
6 play, that this parcel be placed under Williamson
7 Act contract. I'm frankly puzzled to hear the
8 discussion about the Williamson Act, because we
9 don't see it as particularly relevant to this
10 discussion.

11 Similarly the issue that Mr. Harris
12 raised earlier about reverse overrides, I don't
13 see the relevance of that to this issue. Staff
14 again is not trying to mandate that the parcel
15 stay in agricultural production. It is currently
16 in agricultural production, and as part of our
17 analysis we are evaluating whether the termination
18 of that agricultural production is a significant
19 adverse impact as defined in the CEQA guidelines.

20 We see this purely as a CEQA issue. TID
21 has argued that the Commission is precluded from
22 evaluating the issue of whether the conversion of
23 the 18 acres of prime farmland, of irrigated crops
24 to a power plant is a significant impact under
25 CEQA, and whether or not the Commission can impose

1 feasible mitigation for such impacts.

2 The sole legal basis of the applicant's
3 argument appears to be Public Resources Code
4 section 21083.3 and the implementing guideline
5 that we've been discussing earlier this afternoon.

6 These sections basically state that when
7 a subsequent development is consistent with the
8 general plan for which an EIR was previously
9 certified, that the review of the latter lead
10 agency is limited to effect peculiarities of the
11 project, or to effect that new information
12 indicates will be more significant than previously
13 identified.

14 However, the applicant's arguments
15 ignore the fact that the courts have interpreted
16 this very section and determined that its
17 applicability is, in fact, optional. In fact,
18 according to the courts a lead agency must both
19 affirmatively elect to use this provision and
20 provide notice of its intent to use this provision
21 before it can do so.

22 As a result the court, and the case name
23 is Gentry v. The City of Marietta, held a lead
24 agency that had opted to process a project from
25 scratch could not rely on a previous EIR to limit

1 its review of the later project, notwithstanding
2 the fact that all of the criteria in 21083.3 were
3 assumed to be met.

4 The same is true here. The Energy
5 Commission has not chosen to curtail its
6 assessment of this project based on the prior EIR,
7 nor did it at anytime identify the prior EIR as a
8 relevant document in any public notice or request
9 for comments. As a result we should not now be
10 relying on it as justification for not addressing
11 the conversion of prime farmland.

12 In addition, staff recommends against
13 the Commission deciding at this late date that
14 section 21083.3 should be relied upon, and there
15 are three reasons for this.

16 First, the analysis in the 1992 EIR of
17 the impacts caused by the agricultural land
18 conversion is perfunctory, at best. It is not, as
19 the applicant has described, thorough and
20 detailed. Applicant's assertions that the County
21 performed an exhaustive review of this issue are
22 simply not supported by the record.

23 The discussion in the EIR consists of
24 less than a page -- less than a one-page
25 discussion of the amount of acreage that would be

1 converted and a single conclusory statement that,
2 and I quote, "The only measures available which
3 would reduce impacts on agriculture to a level of
4 insignificance would represent substantial changes
5 to the proposed project."

6 Included in the resolution adopting the
7 override which is resolution 93042 is one
8 additional statement. The City Council finds that
9 the ability of the City to meet its fair share of
10 the regional need for housing to insure that there
11 is a balance of jobs and housing and sufficient
12 services for residents of the community as growth
13 occurs outweighs the environmental risk of
14 farmland conversion within the planning area.

15 There's no other discussion of this
16 issue in any of the documents identified by the
17 applicant.

18 In addition, the EIR failed to
19 acknowledge the recommendations of two state
20 agencies, the Department of Conservation and the
21 Department of Food and Agriculture, to evaluate
22 the use of agricultural easements and trusts as
23 potential mitigation measures. This is the same
24 mitigation that staff and the Department of
25 Conservation are, in fact, recommending during

1 this proceeding.

2 In fact, the only method of avoidance
3 discussed in the EIR is the project alternatives.
4 No mitigation is discussed at all. Staff is
5 uncertain why the EIR omitted any discussion of
6 these mitigation options, but believes that the
7 failure to consider them is yet another reason not
8 to rely on the previous EIR.

9 Finally, we note that mitigation may not
10 have been feasible for the conversion of 4700
11 acres, but that that doesn't mean that it isn't
12 necessarily -- that there isn't necessarily
13 feasible mitigation available for the conversion
14 of 18 acres of prime farmland associated with this
15 project.

16 For example, easements of 4700 acres
17 might be prohibitively expensive. However, as the
18 letter from the Department of Conservation
19 indicates, lead agencies are increasingly
20 accepting and requiring the use of easements for
21 agricultural conversion.

22 There's been no evidence presented in
23 this case that such an option is infeasible and
24 should be required as mitigation for the impacts
25 that this project will cause.

1 Although staff believes that the case
2 law is clear that reliance on section 21083.3
3 would be inappropriate in this case, we recognize
4 that the Commission may disagree, and decide that
5 the section should apply.

6 If that is the case, you must carefully
7 consider the extent of review that's required.
8 It's important to note that the language of the
9 statute, and again I'm referring to 21083.3, does
10 not address the question of whether a previous
11 override can be used in conjunction with the later
12 project.

13 As the Committee is aware, although the
14 CEQA process requires overrides in the event that
15 a lead agency wishes to approve a project with
16 unavoidable adverse impacts, the override finding
17 is made after review of the EIR. And yet it is
18 the EIR that section 21083.3 specifically refers
19 to a later lead agency using.

20 In light of this ambiguity staff
21 reviewed the Committee analyses and files prepared
22 at the time that the legislation was pending, to
23 gain a better understanding of the legislative
24 intent of the bill.

25 The bill was proposed because of

1 previous tiering or piggybacking provision of CEQA
2 was, in the minds of the building industry who
3 sponsored the legislation, under-utilized, thereby
4 increasing CEQA compliance costs at the local
5 level. Apparently some local governments were
6 reluctant to rely on those piggybacking provisions
7 for approval of housing developments, and were
8 requiring duplicative analyses. And this bill was
9 designed to address that problem.

10 However, the discussions of the bill's
11 effects that were prepared by the various
12 participants in the legislative process do not
13 address the situation present here where a
14 previous EIR was adopted with a statement of
15 overriding considerations. In fact, they only
16 address situations in which mitigation measures,
17 either those specifically adopted for the project
18 or as identified in the CEQA guidelines, by
19 uniformly applied development policies, in fact
20 mitigated the identified impacts.

21 For example, the bill analysis of the
22 Senate Committee on local government states that
23 the bill would, and I quote, "would omit from an
24 EIR any coverage of adverse impacts which would be
25 mitigated." End quote.

1 Similarly, the Resources Agency stated
2 that, quote, "If mitigation is not required for
3 the identified adverse effect, then the effect
4 would have to be analyzed in a later EIR." End
5 quote.

6 The Republican Caucus say that the bill
7 would apply in situations in which, quote, "The
8 proposed project conforms to a community plan or
9 zoning action for which an EIR was prepared and
10 feasible mitigation measures have been taken."

11 Thus, it would be wrong to read into
12 section 21083.3 an abrogation of the Commission's
13 responsibility to evaluate impacts identified in a
14 previous EIR but not mitigated. This conclusion
15 is not only consistent with the legislative
16 history of the bill, it's consistent with the
17 general principles of CEQA, which require it to be
18 interpreted in such as way as to provide the
19 fullest possible protection to the environment
20 within the reasonable scope of the statutory
21 language.

22 It's also consistent with one of the
23 more recent cases to address a lead agency's
24 responsibility in situations like this. And in
25 Communities for a Better Environment v. The

1 California Resources Agency, a 2002 case, the
2 court addressed the validity of regulations
3 implementing one of the other tiering provisions
4 of CEQA. And the court stated that even if an
5 agency wishes to rely on a previous EIR, if that
6 EIR identified significant unavoidable effects,
7 the decisionmakers in the current case must go on
8 the record and explain explicitly why they are
9 approving a later project despite those
10 significant effects.

11 To do otherwise, the court said, was to
12 allow avoidance of public accountability
13 requirements that mandate that public officials
14 who approve environmentally detrimental projects
15 justify their decision based on analysis of the
16 harm and benefits of the project, that is
17 specifically tied to the project being approved.

18 When that principle was applied to this
19 case it can clearly be seen that no such finding
20 could be made. Staff has presented evidence that
21 there is a significant adverse impact.

22 Interestingly enough, the applicant has argued
23 that the size of the conversion, the 18 acres,
24 renders any potential impact insignificant. I
25 note that their arguments sound alarmingly similar

1 to the ratio theory that's been rejected by
2 several court cases.

3 In any event, I would note that the CEQA
4 guidelines do not specify a minimum size limit.
5 The County's own criteria that are listed in the
6 EIR, itself, do not specify a size threshold.

7 And finally, I would note that the
8 Department of Conservation has a ten-acre
9 threshold that it has recommended in other cases.

10 As a result, staff has concluded that
11 there is a significant impact and that there is
12 feasible mitigation available and should be
13 required. Both staff and the Department of
14 Conservation have identified this conversion of
15 prime farmland and the significant impact, and
16 identified easements or trusts as measures that
17 can be effectively used to mitigate that impact.

18 The applicant has not even addressed the
19 effectiveness of these measures or the
20 feasibility. Instead it argues that the
21 Commission should look the other way merely
22 because a more than ten-year-old EIR contains a
23 less-than-one-page discussion of this issue.

24 Such a position is inconsistent with
25 CEQA, and with the policies that this agency uses

1 to implement CEQA. Just as there are limitations
2 on the CEC's authority to randomly establish
3 conditions of certification unrelated to LORS and
4 to CEQA impacts, so are there also limitations on
5 the extent to which the Commission can rely on
6 previous environmental findings.

7 The law is clear that the 1992 cannot be
8 relied on here. In order to fully meet its
9 responsibilities, to protect the environment from
10 the adverse impacts that will be caused by this
11 project, the Commission should require the
12 mitigation identified by the staff in Land6.

13 Temporarily. I'm sure you'll have
14 questions.

15 HEARING OFFICER VALKOSKY: Okay,
16 referring to exhibit 11, page 4.4-10, this is the
17 staff testimony on land use. The third sentence
18 in the paragraph at the top of the page which
19 states, --

20 MS. HOLMES: I'm not there yet, I'm
21 sorry.

22 HEARING OFFICER VALKOSKY: Oh, I'm
23 sorry.

24 MS. HOLMES: Four dash --

25 HEARING OFFICER VALKOSKY: 4.4-10.

1 MS. HOLMES: I'm on 4.4-10.

2 HEARING OFFICER VALKOSKY: Okay. The
3 third sentence in the paragraph on the top of the
4 page reads: This parcel meets the Department of
5 Conservation's criteria for prime farmland in that
6 it has been farmed and irrigated within the last
7 five years; and it has the required productive
8 soil characteristics. Staff therefore concludes
9 that the project will have a significant adverse
10 impact..." et cetera, et cetera.

11 Is that the extent of the staff analysis
12 on the significance of the impact?

13 MS. HOLMES: Are you asking which
14 criteria staff uses to --

15 HEARING OFFICER VALKOSKY: No, I'm
16 asking you if, you know, you were talking about
17 perfunctory analyses, and I'm asking you if that
18 is the extent of --

19 MS. HOLMES: Oh, I think there's a
20 discussion under cumulative impacts, as well.

21 HEARING OFFICER VALKOSKY: Well,
22 actually, if you go to cumulative impacts, which
23 starts at the bottom of the page, I'd be happy if
24 you'd point it out to me.

25 MS. HOLMES: The project will contribute

1 to the cumulative loss of agricultural land.

2 HEARING OFFICER VALKOSKY: Something a
3 little less perfunctory?

4 (Laughter.)

5 MS. HOLMES: The CEQA guidelines are
6 actually quite -- I don't have them in front of
7 me, but I'm sure we could pull them up and look at
8 them. They simply refer to the conversion of
9 prime ag land as being a significant adverse
10 impact.

11 HEARING OFFICER VALKOSKY: Well, --

12 MS. HOLMES: There is no size limit
13 that's identified. And staff does do an analysis
14 to determine if the soil type and the current
15 irrigation practices are sufficient for the
16 project to --

17 HEARING OFFICER VALKOSKY: Correct, --

18 MS. HOLMES: -- the land that the
19 project would be built on to meet the definition
20 of farmland.

21 HEARING OFFICER VALKOSKY: Correct, and
22 what is your opinion of the purpose of the CEQA
23 guidelines? Or let me put it this way, would you
24 agree with me that the purpose of the CEQA
25 guidelines are to indicate whether you should

1 explore a potential impact in an environmental
2 impact report.

3 MS. HOLMES: Well, I hate to disagree
4 with the person that's going to be ruling on the
5 issue, but I think --

6 HEARING OFFICER VALKOSKY: Feel free.

7 MS. HOLMES: -- that staff tends to give
8 them a little bit more weight than that. I would
9 have to say that typically when we're talking
10 about appendix G, when we say a project will
11 normally -- or an impact will normally be
12 significant if it -- and then you go through the
13 checklist items.

14 I would have to say that staff does not
15 look at those criteria as simply meaning we need
16 to explore it further. I think that we look at it
17 as indicating that there may be a significant
18 adverse impact associated with that impact.

19 HEARING OFFICER VALKOSKY: Okay, I'm at
20 a loss here, since I don't have appendix G in
21 front of me, but to my recollection it says that a
22 certain impact may be significant, not will be
23 significant.

24 Do you agree with that?

25 MS. HOLMES: Yes.

1 HEARING OFFICER VALKOSKY: Okay, and
2 would you further agree that under appendix G that
3 there is not a requirement, per se, that the
4 conversion of farmland be considered significant?

5 MS. HOLMES: That's correct, it's not
6 one of the mandatory findings of significance that
7 are contained elsewhere in CEQA.

8 HEARING OFFICER VALKOSKY: Okay. Are
9 you familiar with the basis for the Department of
10 Conservation's apparent policy that prime farmland
11 has to have been farmed and irrigated within the
12 last five years?

13 MS. HOLMES: I am not, although we do
14 have land use experts here who can answer factual
15 questions. Presumably the applicant does, as
16 well. But I am not personally very familiar with
17 it. This is the first instance that I've run into
18 of this type in the work that I have done in
19 siting.

20 HEARING OFFICER VALKOSKY: Okay, because
21 my concern goes, I would like to know actually if
22 that's a provision in the law, or if it's
23 Department of Conservation Staff policy, or what.
24 So if that could be answered either today or in
25 the briefs, I would really appreciate it.

1 MS. HOLMES: You want to know the basis
2 for the requirement by the Department of
3 Conservation that the farmland be irrigated, is
4 that what you said?

5 HEARING OFFICER VALKOSKY: Farmed and
6 irrigated within the last five years.

7 MR. HARRIS: Mr. Valkosky, could --

8 HEARING OFFICER VALKOSKY: Sure.

9 MR. HARRIS: -- I hadn't heard about
10 this ten-acre thing, either. Could Caryn provide
11 where that came from?

12 MS. HOLMES: Again, that's my
13 understanding from staff that there's a ten-acre
14 threshold, if you will, that the Department of
15 Conservation uses that's come up in other cases.
16 There may be a citation to it in other cases. And
17 I can certainly point you to that if that's the
18 case.

19 MR. HARRIS: Yes, it would be helpful to
20 have that before briefing if it's available.

21 HEARING OFFICER VALKOSKY: Yeah, again,
22 I would certainly appreciate that for my own
23 knowledge.

24 Is staff's position concerning the
25 opinion of the effect of the conversion of

1 farmland based on the fact that it violates
2 applicable LORS? Or that any conversion -- or
3 that the conversion in this case of 18 acres is
4 significant?

5 MS. HOLMES: Staff's position is that
6 the conversion of the 18 acres in this particular
7 case is a significant adverse impact under CEQA.

8 HEARING OFFICER VALKOSKY: Okay, so CEQA
9 is the identified law in that case? There's not
10 something else --

11 MS. HOLMES: Yes.

12 HEARING OFFICER VALKOSKY: -- I'm
13 missing?

14 MS. HOLMES: Not that I'm aware of.

15 HEARING OFFICER VALKOSKY: Okay. In
16 your opinion could the apparent attributes of the
17 project, such as contribution to electricity
18 resources and enhanced reliability of the
19 electricity system outweigh the impacts caused by
20 the conversion of 18 acres of farmland?

21 MS. HOLMES: If we were to reach a
22 situation where there was no feasible mitigation,
23 in other words the trusts and the easements that
24 staff recommended were determined to be
25 infeasible, I suspect that it's quite likely that

1 staff would be capable or be willing to provide
2 testimony detailing, if you will, the project's
3 benefits. And would likely find that they would
4 outweigh the conversion.

5 HEARING OFFICER VALKOSKY: Okay. To
6 your knowledge do other projects in this rezoned
7 area provide compensation for converting any of
8 the 4700 acres of ag land that --

9 MS. HOLMES: I have no idea, and I would
10 note that I don't believe there's any evidence in
11 the record on that issue, although it was referred
12 to earlier by counsel for TID.

13 HEARING OFFICER VALKOSKY: Are there any
14 impacts, based on staff testimony are there any
15 impacts to ag land which are uniquely attributable
16 to this project? Other than conversion of the 18
17 acres.

18 MS. HOLMES: Since we evaluated the
19 project from scratch we didn't attempt to
20 determine whether any of the impacts we were
21 looking at were broader based, or were
22 particularly peculiar to the parcel. We did not
23 conduct that analysis since we were not proceeding
24 under 21083.3.

25 HEARING OFFICER VALKOSKY: Okay. If we,

1 for present purposes, ignore 21083.3 would it be
2 your opinion that the existing evidence of record
3 contains a full and complete discussion of the
4 land use impacts of the project?

5 MS. HOLMES: I believe it contains a
6 full enough discussion to impose mitigation.

7 HEARING OFFICER VALKOSKY: Fair enough.

8 Okay, you'll get one more bite at the
9 apple. Mr. Harris.

10 MR. HARRIS: We may be down to apple
11 seeds at this point.

12 A couple of, I guess I'll limit it to
13 what she said. Let me do that. A couple of
14 thoughts. Number one. The Williamson Act, I
15 think, you know, staff raised that issue and how
16 is it relevant.

17 I think it's relevant in that it shows a
18 statewide policy regarding the protection of
19 farmland. That we acknowledge that staff was not
20 asking for a Williamson Act contract.

21 I think it's very instructive because it
22 provides a view of how the very agency who wants
23 mitigation here, and who commented on the EIR,
24 views the world. And they apparently have a
25 different world view that I don't fully

1 understand. But that's the purpose for the
2 Williamson Act.

3 The reverse override thing, again I
4 think staff made a little bit more out of that
5 than I intended. I just really intended to show
6 that the effect, the potential effect of land use
7 would be to create an in perpetuity ag preserve in
8 an industrial zoned area, that 20 years ago the
9 City of Turlock decided ought to be industrial and
10 not ag. So, that's the purpose for the discussion
11 there.

12 HEARING OFFICER VALKOSKY: Before you
13 move off that point, is there any requirement that
14 the 18-acre ag preserve would have to be in that
15 industrially zoned area?

16 MR. HARRIS: I don't believe the
17 condition required it be in that area. But that
18 obviously would be one of the possibilities.

19 HEARING OFFICER VALKOSKY: One of the
20 possibilities, but it could also be mitigation
21 somewhere outside of that area, right?

22 MR. HARRIS: Correct, yes, it could.

23 HEARING OFFICER VALKOSKY: Okay.

24 MR. HARRIS: Check the language now that
25 I've answered definitively. Yeah, it could,

1 actually, and the condition also allows for the
2 payment of money which to me is interesting given
3 the position has taken in some other cases about
4 payment of fees as mitigation. But I won't go
5 there. I just did and I apologize.

6 Let's see, the CEQA issue. Ms. Holmes
7 suggested that 218 -- 2108 -- I'm dyslexic, I
8 swear, the Public Resources Code provision and
9 CEQA guidelines we're talking about is
10 inapplicable. She referred to the Gentry case,
11 and we're familiar with the Gentry case.

12 I want to make one point of
13 clarification on the Gentry case, and that is
14 this. Gentry did not find a defect with the
15 underlying EIR for the general plan. Gentry found
16 a potential, and the authorities are mixed on
17 this, a potential defect in that the agency taking
18 the subsequent action did not announce that they
19 were proceeding under 21083.3, that section.

20 This is the follow-on action here. In
21 Gentry they said, well, the follow-on action was a
22 negative declaration to take a housing action
23 here. So -- boy, I'm having a hard time
24 articulating this, but basically the problem with
25 Gentry was not with the EIR, the general plan EIR.

1 Just as here the problem is not with the general
2 plan EIR.

3 To be clear, if you rely on 21083.3,
4 I'll want you to articulate that in the findings.
5 But we're not there yet. Ms. Holmes suggests it's
6 pretty late in the process, you're too far down
7 the road. It's a legal argument. If I'd have
8 raised it earlier Caryn would have moved to strike
9 it as a legal argument.

10 This is the point to raise this legal
11 argument, number one. And number two, it's your
12 action and not the staff's analysis that is
13 subject to that Gentry restriction. And so Gentry
14 is not a prohibition to you using that section.

15 I think you've made the points I was
16 going to make about the perfunctory analysis in
17 the 20-year EIR process versus the staff's
18 document, so I'll move past that.

19 The basic problem that I have here is
20 that staff seems to assume a zero. Anything more
21 than zero is a significant impact under CEQA. She
22 couldn't point to a specific CEQA provision that
23 said, this, you know, five acres, ten acres, 20
24 acres, 30 acres is significant.

25 My view is that staff is saying it's

1 more than zero, so it's significant. You know, if
2 this was a one-acre power plant, although we
3 couldn't do that, I think staff would want one
4 acre. That's not what CEQA requires. CEQA
5 requires an analysis of significant impacts, and
6 it requires more than that kind of hard and fast
7 numeric analysis.

8 In response to the concern that, gee,
9 there's nothing really legislative intent, which I
10 find interesting, was that didn't say anything
11 about prior statements of overriding
12 consideration. I think staff's position there
13 really nullifies that statement. It says
14 basically ignore it.

15 Finally, I'll answer any questions after
16 this, Ms. Holmes suggested that we were asking you
17 to look the other way. We're not asking you to
18 look the other way; we're asking you to look back,
19 and look back at an administrative record that's
20 developed over 20 years, that has five different
21 environmental documents, 14 public meetings, a
22 series of actions that were subject to public
23 comment, public discussion under a CEQA process,
24 not an Energy Commission process, but a CEQA
25 process nonetheless. And a process that withstood

1 litigation.

2 So, don't look the other way, look at
3 the record. It's all here. It's been analyzed,
4 and I don't see any basis in law or policy for you
5 all to take a look at that and say we have to look
6 the other way from the record. Take a look at the
7 record, please.

8 HEARING OFFICER VALKOSKY: Ms. Holmes.

9 MS. HOLMES: Just a few quick points
10 because I think we all want to get out of here.

11 First of all I do have concerns about
12 the references to the Williamson Act because I
13 don't read anything in the provisions of the
14 Williamson Act, with which I am familiar, that
15 indicates that it's in any way an attempt to
16 supersede CEQA.

17 There's nothing in CEQA, for example,
18 that says we can ignore a conversion of prime
19 agricultural land because there's the Williamson
20 Act process out there to deal with those kinds of
21 problems.

22 There is no such exemption and we
23 shouldn't look to the Williamson Act to provide
24 that type of an exemption here.

25 I also find the applicant's reference to

1 giving deference to the Department of Conservation
2 very interesting, given that the Department of
3 Conservation, itself, recommended mitigation in
4 the 1992 EIR, which the County chose not to --
5 excuse me, the City chose not to implement. And
6 the Department of Conservation has recommended
7 mitigation here.

8 With respect to the Gentry case, I'm
9 having trouble understanding what the effect is of
10 whether or not there was a defect in the
11 underlying EIR. It seems to me that that's quite
12 irrelevant. The question that the court was
13 asking was what does an agency have to do if it
14 wants to rely on that section to curtail its later
15 environmental analysis.

16 And the courts were quite clear that
17 what they must do is provide intent of their
18 notice to proceed under that section when they
19 begin their environmental analysis. And this we
20 have not done.

21 Even if the Commission were to decide
22 that it's appropriate to do so at this point, to
23 rely on that section to curtail its prior
24 environmental review, that section, 21083.3,
25 cannot be used to avoid the necessity of making

1 our own decision on the question of whether there
2 are overriding considerations, or whether or not
3 there is feasible mitigation for the previously
4 identified significant adverse impacts.

5 Finally, the applicant has argued that,
6 or pointed out that staff has not pointed to a
7 section of CEQA that says the conversion of 18
8 acres of prime farmland is a significant impact.
9 That's true. That's true for just about every
10 single impact for which we recommend mitigation
11 and for which this Commission imposes mitigation.

12 We've identified that there is currently
13 irrigated and farmed land that's going to be lost
14 as a result of this project. We believe that
15 there is feasible, and to be quite frank, not very
16 onerous mitigation that is available. The
17 Department of Conservation has concurred with us,
18 and we encourage the Committee to impose that
19 mitigation for this project.

20 HEARING OFFICER VALKOSKY: Am I correct
21 in my understanding that the plant parcel is not,
22 in fact, subject to the Williamson Act?

23 MS. HOLMES: I believe it is not.

24 HEARING OFFICER VALKOSKY: Okay. You
25 mentioned earlier the CVE case. Was a statement

1 of overriding considerations involved in that
2 case?

3 MS. HOLMES: Yes. And the section of
4 that decision which addresses -- I'm going to get
5 the number wrong now -- hold on -- 21094. And a
6 subsection of -- excuse me, I'm sorry. It was a
7 regulation that was implementing section 21094.
8 And the court held that subsequent lead agency,
9 even if it chose to rely entirely on a previous
10 EIR, pursuant to that code section could not rely
11 on the previous agency's statement of overriding
12 considerations because the court held that that
13 was an abrogation of the decisionmaker's
14 responsibility to weigh the project benefits and
15 the project detriments specific to the project
16 being approved.

17 HEARING OFFICER VALKOSKY: Okay, thank
18 you. You mentioned the Department of Conservation
19 recommended mitigation. I take it you're
20 referring to the September 2nd letter which has
21 been docketed?

22 MS. HOLMES: Yes. As well, if you look
23 at the EIR which has been, you have taken official
24 notice of, there is a letter from the Department
25 of Conservation, as well as from the Department of

1 Food and Ag in response to the notice of
2 preparation recommending consideration of the use
3 of agricultural trusts and easements as mitigation
4 for conversion of prime farmland.

5 HEARING OFFICER VALKOSKY: Okay. And
6 did the EIR specifically address that
7 recommendation?

8 MS. HOLMES: No, it did not.

9 HEARING OFFICER VALKOSKY: How does this
10 situation differ from that in the Metcalf case?
11 Basically --

12 MS. HOLMES: I'm sorry to tell you --
13 maybe I'm very happy to tell you, I'm not familiar
14 with the Metcalf case.

15 (Laughter.)

16 HEARING OFFICER VALKOSKY: All right,
17 I'll give you some -- okay, that land was not
18 irrigated and farmed, and, Mr. Harris, please
19 correct me if I misstate this, but that land was
20 not irrigated and farmed within the last five
21 years. It did involve a conversion of a 20-acre
22 parcel.

23 Staff basically relied on the City
24 Planning Department's view that any conversion of
25 prime farmland would constitute a significant

1 impact. The land had been rezoned for light
2 industrial development.

3 And essentially I'm cutting this short,
4 but basically the Commission stated in their
5 opinion the small number of converted acres, 20,
6 due to the MEC, would not constitute an
7 environmental impact given the level and nature of
8 projected development, which again was light
9 industrial development. As well as the parcel's
10 campus industrial designation.

11 Furthermore, staff acknowledges that
12 even if the MEC project is not built, development
13 of the site for approved uses, such as campus
14 industrial, would result in a loss of a similar
15 amount of farmland.

16 Accordingly we find that the conversion
17 of the parcel for use by the MEC will not result
18 in a significant adverse impact.

19 Does that situation differ substantially
20 from what we have here?

21 MS. HOLMES: Again, I'm uncomfortable
22 addressing Metcalf. I would respond in part,
23 though, by saying that it doesn't appear to me,
24 based on what you've read, that the more in-depth
25 legal discussion of the various CEQA guideline

1 sections and statutory sections was addressed in
2 the Metcalf case.

3 So it's not clear to me that it was the
4 same debate, based on what you've read to me.

5 MR. HARRIS: Mr. Valkosky, I vaguely
6 remember Metcalf. Ten of the 20 acres were
7 irrigated at Metcalf, so half of that was in
8 agricultural production. The other half was being
9 used to raise chickens and hold certain illicit
10 animal activities, so --

11 HEARING OFFICER VALKOSKY: Yeah.

12 MR. HARRIS: -- I'm not sure if that
13 counts as --

14 (Laughter.)

15 MR. HARRIS: -- putting the other -- if
16 we can count --

17 MS. HOLMES: That's a significant
18 difference, Mr. Valkosky.

19 MR. HARRIS: There are chickens --

20 HEARING OFFICER VALKOSKY: That's true,
21 there's a very active --

22 MR. HARRIS: -- nearby here, too, but
23 they're having a different fate, so actually it's
24 not different, from the chickens' perspective.

25 (Laughter.)

1 HEARING OFFICER VALKOSKY: Okay, with
2 that clarification and --

3 (Laughter.)

4 HEARING OFFICER VALKOSKY: All I'm
5 suggesting is that the Commission has already
6 decided that if you've got -- or has already held,
7 I can't say that it's been decided, but has
8 already held that the conversion of a rather small
9 number of acres in an area which is no longer
10 zoned for agricultural use is less than a
11 significant impact.

12 And what I'd like to know is your
13 opinion, and, you know, certainly you can bring it
14 out in your brief, how that situation would
15 substantially differ from the one we have here.

16 MS. HOLMES: Well, again, I would be
17 happy to address that. I don't know whether or
18 not the situation is significantly different. In
19 addition, I think there may be additional
20 authority that you've heard referenced today,
21 including guidelines from the Department of
22 Conservation that you may want to take official
23 notice of at some point that may make the
24 Committee change its mind about what the
25 appropriate --

1 HEARING OFFICER VALKOSKY: No, that's
2 entirely possible. Again, I don't recall any
3 formal guidelines --

4 MS. HOLMES: I don't believe there is
5 anything in the record --

6 HEARING OFFICER VALKOSKY: -- having
7 been brought up, yeah.

8 MS. HOLMES: -- of this case that
9 provides the ten-acre limit.

10 HEARING OFFICER VALKOSKY: Thank you.

11 PRESIDING MEMBER BOYD: Ms. Holmes, you
12 said that both Food and Ag and DOC commented on
13 the EIR, and we do have those documents?

14 MS. HOLMES: They commented on the
15 notice of preparation, and there is no response to
16 those comments, presumably because the lead agency
17 only responded to comments on the draft.

18 But in the notice of preparation on this
19 EIR, both the Department of Food and Ag and the
20 Department of Conservation recommended a series of
21 mitigation measures for the conversion of prime
22 farmland, including consideration of trusts and
23 easements.

24 PRESIDING MEMBER BOYD: Okay, thank you.

25 HEARING OFFICER VALKOSKY: Last

1 question, Caryn. Do you think or does staff think
2 that it is a workable policy to keep revisiting
3 areas which have been already visited by agencies
4 in the CEQA context?

5 In other words, I'm interested in why
6 shouldn't be give basically full faith and credit
7 to prior determinations.

8 MS. HOLMES: Well, again, as I stated in
9 this case, I think that the case law prohibits you
10 from using one of the piggyback provisions that
11 was referred to by Mr. Harris. The other
12 piggybacking provisions explicitly require you to
13 do your own assessment of whether or not an
14 override is required.

15 Let me make it really clear. There's no
16 dispute here that there was a significant adverse
17 impact associated with the conversion of the 4200
18 or 4300 acres of prime farmland. There is no
19 evidence in the record that I'm aware of about
20 whether the City believes that the conversion of
21 this particular parcel is significant or not.

22 So it's not a question of us revisiting
23 an issue that the City already addressed. They
24 addressed the conversion of the entire 4200 acres.

25 And, again, I would just simply

1 recommend that the Committee proceed in accordance
2 with the various piggybacking sections of CEQA
3 that are provided for that use.

4 HEARING OFFICER VALKOSKY: Okay, thank
5 you.

6 Anything further on the land use?
7 Public comment on the land use topic? Seeing
8 none, we'll close the record on that one.

9 The last topic is alternatives.

10 (Pause.)

11 MR. HARRIS: Mr. Valkosky, I was just
12 going to make the witness available for cross, but
13 do we need to have him sworn.

14 HEARING OFFICER VALKOSKY: Oh,
15 absolutely.

16 MR. HARRIS: All right. Mr. Carrier.
17 Whereupon,

18 JOHN CARRIER
19 was called as a witness herein, and after first
20 having been duly sworn, was examined and testified
21 as follows:

22 MR. HARRIS: Excuse me, I had to find my
23 magical questions.

24 //

25 //

1 DIRECT EXAMINATION

2 BY MR. HARRIS:

3 Q Could you state your name for the
4 record, please.

5 A John Carrier.

6 Q And what subject matter of testimony are
7 you here to answer questions for?

8 A Alternatives.

9 Q And were the documents that you included
10 in your prefiled testimony identified in section
11 1(d)?

12 A Yes.

13 Q And that is exhibit 1, section 9.0 of
14 the AFC. Do you have any changes, corrections or
15 clarifications to your testimony?

16 A What was it?

17 Q Any changes, corrections or
18 clarifications to your testimony?

19 A No.

20 Q And were the documents prepared either
21 by you or at your direction?

22 A Yes.

23 Q And the facts stated therein are true to
24 the best of your knowledge?

25 A Yes.

1 Q The opinions stated therein are your
2 own?

3 A Yes.

4 Q And you adopt this as your testimony?

5 A Yes.

6 MR. HARRIS: Any objection to Mr.
7 Carrier as an expert on this? I'll skip his
8 qualifications then unless the Committee would
9 like to hear more.

10 HEARING OFFICER VALKOSKY: That's fine.

11 MR. HARRIS: And this is the best
12 testimony I've ever seen so I have no direct. So
13 I'll make the witness available for cross.

14 HEARING OFFICER VALKOSKY: Ms. Holmes.

15 MS. HOLMES: I'm not going to agree with
16 the characterization, but I have no cross.

17 (Laughter.)

18 HEARING OFFICER VALKOSKY: Mr. Carrier,
19 I have but a single question, which is would the
20 adoption of any of staff's proposed conditions of
21 certification, or mitigation measures, make the
22 proposed project infeasible or render an
23 alternative preferable?

24 MR. CARRIER: I don't believe so.

25 HEARING OFFICER VALKOSKY: Okay, thank

1 you. Anything else?

2 MR. HARRIS: Move his testimony into
3 evidence, please.

4 HEARING OFFICER VALKOSKY: Objection?

5 MS. HOLMES: No objection.

6 HEARING OFFICER VALKOSKY: We'll receive
7 the aforementioned exhibits.

8 Ms. Holmes.

9 MS. HOLMES: Thank you. Staff's witness
10 in the area of alternatives is Mr. Bob Eller, and
11 I believe he does need to be sworn.
12 Whereupon,

13 BOB ELLER
14 was called as a witness herein, and after first
15 having been duly sworn, was examined and testified
16 as follows:

17 DIRECT EXAMINATION

18 BY MS. HOLMES:

19 Q Could you state your name for the
20 record, please.

21 A Bob Eller.

22 Q Did you prepare the alternatives section
23 of the FSA which has been identified as exhibit
24 11?

25 A Yes, I did.

1 Q And was a statement of your
2 qualifications included therein?

3 A Yes, it was.

4 Q Do you have any corrections or changes
5 to make to your testimony today?

6 A No, I do not.

7 Q Are the facts contained in your
8 testimony true and correct to the best of your
9 knowledge?

10 A Yes, they are.

11 Q And do the opinions contained in your
12 testimony represent your best professional
13 judgment?

14 A Yes, they do.

15 MS. HOLMES: And I also have no cross
16 because this is the best testimony ever written.
17 Direct, excuse me. Direct.

18 (Laughter.)

19 HEARING OFFICER VALKOSKY: Mr. Harris.

20 MR. HARRIS: Sorry, John, I agree with
21 Caryn. This is better. I have no questions.

22 HEARING OFFICER VALKOSKY: Mr. Eller,
23 would failure to adopt any of staff's proposed
24 conditions make another identified alternative
25 preferable to the project as proposed?

1 MR. ELLER: Perhaps.

2 HEARING OFFICER VALKOSKY: And could you
3 expand upon that?

4 MR. ELLER: In the case of land use, our
5 conclusion that there are no significant impacts
6 is based upon mitigation for agricultural
7 conversation. I did not specifically look at the
8 alternative sites that are contained in the
9 alternative section to see whether, in fact, they
10 may have paid mitigation or not paid mitigation.

11 I note that several of them appear to be
12 on existing agricultural land. I don't know that
13 conclusion without doing further analysis.

14 HEARING OFFICER VALKOSKY: Okay. How
15 about for the proposed conditions in the air,
16 specifically AQC6 and C8?

17 MR. ELLER: I don't believe that if
18 those were imposed on this project at another
19 alternative site they would have the same impacts,
20 so, no, it would not affect --

21 HEARING OFFICER VALKOSKY: Would failure
22 to adopt any of staff's recommended measures
23 result in unmitigated significant impacts which
24 could be avoided by use of an identified
25 alternative?

1 MR. ELLER: Perhaps in land use, but,
2 again, I have not done that analysis.

3 HEARING OFFICER VALKOSKY: Okay. On
4 page 6-9 concerning the no-project alternative you
5 indicate that without the project contribution to
6 electricity resources, increased competition and a
7 more reliable electricity system are benefits that
8 would be foregone without the project.

9 In your opinion, would these benefits
10 outweigh conversion of the ag land?

11 MR. ELLER: Yes.

12 HEARING OFFICER VALKOSKY: Okay, even if
13 the conversion of the ag land was not mitigated as
14 staff suggests?

15 MS. HOLMES: Can I ask a question of
16 clarification? I hate to object to the Hearing
17 Officer's question --

18 HEARING OFFICER VALKOSKY: Sure.

19 MR. HARRIS: Feel free.

20 HEARING OFFICER VALKOSKY: You're going
21 to be overruled, but that's okay.

22 (Laughter.)

23 MS. HOLMES: It's usually bad form. Are
24 you asking, I guess what I'm concerned about,
25 because it has to do with the legal issue we were

1 just discussing, has there been a finding that
2 there was mitigation -- that the mitigation was
3 infeasible before you got to the override
4 question? Is that --

5 HEARING OFFICER VALKOSKY: No, --

6 MS. HOLMES: -- is that an assumption of
7 your question?

8 HEARING OFFICER VALKOSKY: -- no, what I
9 am saying is I'm basically looking for something,
10 I guess you could call it a relative merit thing.
11 What is more important, in this witness' opinion,
12 the contribution of the project to electricity
13 resources, increased competition and so forth, or
14 mitigation, as staff suggests, of the land use
15 impacts.

16 Will it be prefatory to an overriding
17 consideration, I guess.

18 MR. ELLER: Well, this project is
19 important to add resources for both TID and the
20 State of California.

21 I couldn't testify to you today that
22 this particular project at this particular
23 location would outweigh the benefits of ag land
24 conversion.

25 HEARING OFFICER VALKOSKY: Okay, fair

1 enough. Thank you. Anything else for the
2 witness?

3 MS. HOLMES: -- into evidence; I don't
4 believe, Jeffery, that you moved your alternatives
5 testimony into the record.

6 MR. HARRIS: Okay, -- try and figure out
7 if I can recant my summary of Bob's testimony.

8 Yeah, I'd like to move my documents into
9 evidence and begrudgingly have no objection to
10 staff doing the same.

11 HEARING OFFICER VALKOSKY: Is there an
12 objection?

13 MS. HOLMES: No objection.

14 HEARING OFFICER VALKOSKY: Those
15 documents are received.

16 Ms. Holmes, move yours?

17 MS. HOLMES: I believe I already did.

18 HEARING OFFICER VALKOSKY: Well, I --

19 MS. HOLMES: Oh, you didn't rule on it,
20 okay.

21 HEARING OFFICER VALKOSKY: -- I didn't
22 accept it.

23 MS. HOLMES: I move anything that I
24 haven't moved that I ought to have moved into the
25 record.

1 HEARING OFFICER VALKOSKY: Sounds good.

2 Is there any objection?

3 MR. HARRIS: As long as I can do the
4 same, because we want to make sure all portions of
5 exhibit whatever it is --

6 HEARING OFFICER VALKOSKY: Exhibit 45.

7 MR. HARRIS: -- 45, that we may have
8 missed today, I'd like to move those in.

9 HEARING OFFICER VALKOSKY: Okay, that
10 will be admitted.

11 Is there any public comment on the topic
12 of alternatives? Seeing none, we'll close the
13 record on that topic.

14 And by my list when we come back on the
15 9th we'll deal with the possible modification to
16 air quality condition C8, soil and water and the
17 compliance issue. Does that comport with
18 everybody's understanding?

19 MR. HARRIS: Yes. And we're hoping that
20 the first two issues will be dealt with without
21 any witnesses or anything, so basically by
22 declaration.

23 HEARING OFFICER VALKOSKY: We share your
24 hope. Anything else, Ms. Holmes?

25 MS. HOLMES: No.

1 HEARING OFFICER VALKOSKY: Thank you.

2 We're adjourned.

3 (Whereupon, at 3:42 p.m., the hearing
4 was adjourned, to reconvene on Thursday,
5 October 9, 2003, at this same location.)

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CERTIFICATE OF REPORTER

I, PETER PETTY, an Electronic Reporter,
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I further certify that I am not of
counsel or attorney for any of the parties to said
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